IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-5845

CATHERINE JACKSON, On Behalf of Herself and All Others Similarly Situated,

Petitioner

VS.

METROPOLITAN EDISON COMPANY, A Pennsylvania Utility Corporation

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the third circuit which has affirmed the judgment and order of the United States District Court for the middle district of Pennsylvania and has dismissed Petitioner's complaint for lack of subject matter jurisdiction.

OPINIONS BELOW

The opinion and judgment of the district court, dated June 30, 1972, dismissing Petitioner's complaint, appears in Appendix I and is reported at Jackson vs Metropolitan Edison Co., 348 F.Supp. 954 (M.D., Pa., 1972).

The opinion and judgment of the court of appeals, dated August 21, 1973, affirming the decision of the district court, appears in Appendix II. This opinion and judgment has now been reported at 483 F.2d 754 (3rd Cir., 1973).

JURISDICTION

The opinion and judgment of the court of appeals was entered August 21, 1973. By order dated September 27, 1973, that court allowed filing of Petitioner's Petition for Rehearing. By order dated October 25, 1973, that petition was denied without opinion.

This petition is timely filed pursuant to 28 U.S.C. §2101(c); and this court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

Jurisdiction of the court below was based on 42 U.S.C. §1983 and 28 U.S.C. §1343(3) and (4).

QUESTIONS PRESENTED

1. Whether a public utility corporation which is engaged in a public function, subject to substantial governmental regulation and control, beneficiary of a state authorized monopoly, and required to conform its

service and termination practices to a statutory standard of reasonableness and regulatory review acts under color of law in terminating residential utility service.

2. Whether residential utility service is an "entitlement" which can be terminated without due process of law.

STATUTORY AND REGULATORY PROVISIONS

The general managerial and operational function of Metropolitan Edison is subject to substantial governmental intervention and control under the Pennsylvania Public Utility Code, 66 P.S. §§452 et seq.; §§1101 et seq. For reasons of economy, Petitioner has not set forth this Code. However, the following statutes and regulations are pertinent to this case and are set out verbatim in Appendix III.

1. Pennsylvania Public Utility Code: 66 P.S.

   a) §452. Commission established
   b) §1101. Short title
   c) §1123. Certificates of convenience
   d) §1141. Rates to be just and reasonable
   e) §1142. Tariffs: filing and inspection
   f) §1144. Discrimination in rates
   g) §1171. Character of service and facilities
   h) §1172. Discrimination in service
   i) §1182. Standards of service and facilities
   j) §1183. Regulation of service
   k) §1121. Mandatory system of accounts
   l) §1241. Registration of securities to be issued or assumed
   m) §1271. Contracts for services
   n) §1341. Administrative authority of commission; regulations
   o) §1342. Commission to enforce act
   p) §1343. Enforcement proceedings by commission
   q) §1360. Contracts; power of commission to vary, reform or revise

2. Pennsylvania Public Utility Commission Tariff Regulations:

   a) Section II. Public Notice of Tariff Changes
   b) Section VIII. Discount for Prompt Payment and Penalties

3. Pennsylvania Public Utility Commission Electric Regulations:

   Rule 14 - Adjustment of Bills
   D. Access to Meters

4. Metropolitan Edison Company Electric Tariff:

   No. 41, Rule 15

5. Kansas Statutes Annotated

   KSA, §66-101

STATEMENT OF THE CASE

On October 18, 1971, Petitioner, Catherine Jackson, brought an action under the Civil Rights Act, 42 U.S.C. §1983, on behalf of herself and all others similarly situated against the Respondent Metropolitan Edison Company, a regulated Pennsylvania utility corporation, for damages, injunctive, and declaratory relief. Petitioner challenged the corporation's practice of summary termination of residential utility service for alleged non payment of a bill, without notice or opportunity for a prior hearing. Petitioner asserted that this challenged termination procedure, pursuant to the corporation's Electric Tariff No. 41, fails to comply with the requisites of procedural due process of law under the Fourteenth Amendment to the Constitution of the United States.

On October 18, 1971, a Temporary Restraining Order was granted and was continued by agreement of the parties. Following a hearing on a preliminary injunction, the Court granted the Defendant's motion to dismiss on June 30, 1972, for failure to state a cause of action, ruling that the Defendant did not act under color of law in terminating Petitioner's electricity. The court held that the Defendant's conduct was private and that the state was not directly involved in the termination action.

An appeal was filed with the Third Circuit on July 13, 1972, and the restraining order was continued on August 7, 1972. The Appellant argued that the lower court had erred in its narrow analysis of the issue of state action and that the state was, in fact, directly involved in the Defendant's conduct. Following oral argument on May 4, 1973, the Court of Appeals affirmed the decision of the District Court on August 21, 1973. The Court held that electricity was not a necessity of life and that the state was under no constitutional duty to furnish same. The Court further held that the lower court was correct in applying the narrow test of state action, and characterized the Defendant's conduct as private. A petition for rehearing before the court en banc was denied without opinion on October 25, 1973.

REASONS FOR GRANTING THE WRIT

At issue here is whether a public utility acts under color of law in terminating a customer's utility services for non payment of a disputed bill. Petitioner asserts that where utility service is provided by a public utility corporation which is engaged in a public function, is subject to substantial regulatory control, is the beneficiary of a state created monopoly, and is required to conform its service and termination practices to a statutory standard of reasonableness and regulatory review, the state's involvement is of such substance as to subject the corporation's affairs to the Fourteenth Amendment.

It is submitted that a writ of certiorari should be granted for the following reasons:

a) The Third Circuit has decided important federal questions in a manner inconsistant with decision of this court;

b) There is irreconcilable conflict among the Circuit Courts of Appeals regarding the substantial federal question of whether a public utility acts under color of law in terminating services for non payment of bills in the absence of due process of law; and

c) The Third Circuit has decided important federal questions which have not, but which should be decided by this court.

I. The Court of Appeals Has Decided Important Federal Questions In a Manner That is Inconsistant With Decisions of This Court

A. The Limited State Action Analysis of The Court of Appeals Conflicts With the Rule of This Court

The Court of Appeals has avoided a comprehensive analysis of the state action issue which would demonstrate the scope and extent of the Commonwealth's involvement with and participation in the affairs and challenged practices of Metropolitan Edison. Rather, the court has adopted a one dimensional analysis which narrowly focuses upon specific or obvious state authorization as its sole index of action under color of law. It has largely ignored the singular and cumulative effect of those several indices presented by Petitioner.

In the first instance, the Court of Appeals has disregarded the Commonwealth's affirmative assumption of responsibility for provision of utility

service and its designation of Metropolitan Edison as its exclusive agent to undertake this public function. Thus, ". . . when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations". Evans vs Newton, 382 U.S. 296, 29 ᶜ(1966). Once the state has assumed responsibility to oversee the provision of necessary services, those services rise to the level of a statutory entitlement, subject to due process requirements. Bell vs Burson, 402 U.S. 535 (1971). Thus, see Ihrke vs Northern States Power Co., 459 F.2d 566 (C.A. 8, 1972), cert. granted, vacated on mootness, 34 L.Ed.2d 72 (1973) where the court stated that the furnishing of electricity was the duty of the state. Also see Bowman vs City of Birmingham, 280 F.2d 531, 534 (C.A. 5, 1960).

The Court of Appeals noted that in Moose Lodge 107 vs Irvis, 407 U.S. 163 (1972) this Court required that for purposes of state action, the state must benefit from or in some way foster, encourage or support the conduct challenged. Also see Lucas vs Wisconsin Electric Co., 446 F.2d 638 (C.A. 7, 1972) cert. den. 34 L.Ed.2d. 696 (1973). In this regard, the Court of Appeals ignored the benefit derived by the state in this case. The Commonwealth has assumed responsibility to oversee the supply of utility services and therefore, in addition to the cost savings in not having to be the direct supplier of utility services, the state has an interest in seeing that service is provided at the lowest possible costs for its citizens. 66 P.S. §1171, §1141. Since relatively unfettered and summary termination procedures result in lower operating costs, and hence in lower rates, the state thereby directly benefits from the conduct challenged herein.

Similarly, the court's decision does not appreciate the significance of Metropolitan Edison's status as a state created monopoly. The corporation's exclusive franchise represents a fundamental market restructure from private to government control for the mutually beneficial purposes of assuring that adequate utility service is provided by an economically viable corporation. It is apparent that this state authorized monopoly causes the utility to enjoy

a favored economic position, and thus has the effect of encouraging summary termination of utility services, since a utility would be less prone to terminate services in a competitive field. The consequence of the exclusive franchise is the creation of an entity which is more akin to a government authority or government corporation than it is to a private, open market business corporation. It demonstrates an economic-operational interdependence between the Commonwealth and Metropolitan Edison which cannot be considered as so purely private as to fall without the scope of the Fourteenth Amendment. Burton vs Wilmington Parking Authority, 385 U.S. 715, 725 (1951).

More importantly, the Court of Appeals has failed to recognize that pervasive regulation distinguishes Metropolitan Edison from a typical business entity. Indeed, every significant aspect of the utility corporation's business is subject to comprehensive statutory and administrative regulation which is apart from and reaches well beyond that to which a private, open market business corporation is subject. 66 P.S. §452 et seq.; §1101 et seq., §§1123, 1141, 1142, 1144, 1171, 1172, 1182, 1183, 1211, 1241, 1271 and 1360. This substantial governmental intervention and control cannot, of course, be dismissed as without significant relevance to the issue of state action. Public Utility Commission vs Pollak, 343 U.S. 451, 462 (1952).

Finally, it must be noted that the Court of Appeals has erred in applying its own standard of state action, since governmental authorization for the termination practices of Metropolitan Edison exists herein. It should be noted that the corporation's termination regulation, Electric Tariff No. 41, is subject to a statutory standard of reasonableness. The Public Utility Code, 66 P.S. §1171, states inter alia:

> "Subject to the provisions of this act and the regulations or orders of the [Public Utility] Commission, every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service . . ."

Together with the Public Utility Commission's formal submission requirements and its regulatory authority to review and approve proposed tariffs, this statute requires the utility to adopt and to comply with regulations acceptabl

to the Commission. See PUC Tariff Reg., No.II, and 66 P.S. §1341, 1342, 1343. Metropolitan Edison's Electric Tariff No. 41 has been so submitted and accepted by the Commission.

The sole Commission regulation specifically dealing with the termination of services is PUC Tariff Regulation, Section VIII, which provides that a public utility shall set forth in its Tariff a rule setting forth the "circumstances and conditions" under which services will be terminated. In its review of Metropolitan Edison's termination tariff above, the Commission did not order that the tariff also include a provision for notice and opportunity for a prior hearing as a condition prior to termination of services. In exercising its extensive authority above, the Commission has thereby assented to and has authorized the procedures challenged herein. Public Utility Commission vs Pollak, supra.

It is evident that these statutory and regulatory provisions directly and significantly involve the Commonwealth with the challenged practice. This scheme goes far beyond the simple notice-filing requirement noted by the court's decision, which was found to be insufficient for state action purposes in Kadlec vs Illinois Bell Telephone Co., 407 F.2d 624 (C.A. 7, 1969). In contrast, in the instant case, the Public Utility Commission is to define the standard of reasonableness, review proposed regulations and accept or reject those regulations. 66 P.S. §1171, 1141, 1341. Having required, reviewed, and accepted the termination tariff herein, the Commission has vested Tariff No. 41 with the apparent authority of the Commonwealth and thereby clothed the termination practices with the legitimacy of law. Reitman vs Mulkey, 387 U.S. 369 (1967). To dismiss the tariff as without government authorization because it was drafted and submitted by Metropolitan Edison rather than by the Commission is to assert a distinction without substance which has been rejected by the decision in Reitman.

In contrast to the narrow analysis of the Court of Appeals, this Court has repeatedly declared that the issue of action under color of law is not so limited; rather, it is a function of a range of factors.

> "While the principle is easily stated, the question of whether particular discriminatory conduct is private, on the one hand, or amounts to 'state action', on the other hand, frequently admits of no easy answer. 'Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.'" Moose Lodge No. 107 vs Irvis, 407 U.S. 163, 172 (1972), citing Burton vs Wilmington Parking Authority, 365 U.S. 715, 722 (1961).

In each case, comprehensive consideration is given to every factor which reasonably bears upon the issue of government's relation to and involvement with challenged conduct. These include: (1) public function or governmental purpose. Marsh vs Alabama, 326 U.S. 501 (1946). Burton vs Wilmington Parking Authority, supra; (2) substantial governmental regulation, American Communication Ass'n. C.I.O. vs Douds, 369 U.S. 382 (1950). Public Utilities Commission vs Pollak, supra; (3) direct governmental authorization, encouragement, or enforcement, Public Utilities Commission vs Pollak, Evans vs Newton, supra, Reitman vs Mulkey, supra; and (4) state authorized monopoly or economic interdependence, Burton vs Wilmington Parking Authority, supra. In each case, it is both the singular and cumulative effect of these variables which demonstrates the scope and extent of government involvement in the conduct of an otherwise private entity.

Had the court of appeals followed the rule of this Court, it would have been compelled to the conclusion that the relation between the Commonwealth of Pennsylvania and Metropolitan Edison meets every established index of state action. The corporation is engaged in a public function, subject to substantial regulation, and beneficiary of a state created monopoly. Moreover, its challenged termination practice is directly subject to Pennsylvania statute and regulatory review by the Public Utility Commission. There exists that involvement and interdependence which this Court has characterized as symbiotic. Moose Lodge vs Irvis, supra.

B. The Ruling That Residential Utility Service Is Not A Protected Property Interest Conflicts With The Rule of This Court

The court of appeals has determined that residential utility service is merely a consumer convenience provided by a private business corporation, and is therefore, not to be protected by the Fourteenth Amendment. The court

concludes that there is no federal remedy for arbitrary termination of utility services and that it is a state problem to be resolved by the Public Utility Commission or the legislature.

In reaching this conclusion, the court has overlooked the essential fact that residential utility service must be provided by law to all consumers who meet reasonable eligibility requirements. A Pennsylvania utility corporation is not free to offer or withhold service; a basic condition of its certificate of convenience is that the corporation provide utility service to all eligible consumers within its service area. 66 P.S. §§1123, 1171, 1172. Residential utility service is thus an entitlement mandated by the Commonwealth. And like other entitlements, whether characterized as subsidies, licenses, certificates of convenience, public assistance, or unemployment compensation, it is a property interest, so recognized by this Court, and is to be protected by the Fourteenth Amendment. Goldberg vs Kelly, 397 U.S. 254, 262, n. 8 (1970) California Department of Human Resources vs Java, 462 U.S. 121 (1971); Bell vs Burson, 402 U.S. 535 (1971).

In addition, it is submitted that utility services are today a necessity of life. Such services are not a mere convenience or a de minimus interest. A consumer has no realistic alternatives to obtain life sustaining services when deprived of utility services. The interest in continued receipt of such services is a significant property interest subject to the protections of the Fourteenth Amendment. Fuentes vs Shevin, 407 U.S. 67 (1972); Sniadach vs Family Finance Corp., 395 U.S. 337 (1969).

C. The Rule That Metropolitan Edison's Termination Practice Satisfies Due Process of Law Conflicts With The Rule of This Court

The decision below has approved, as consistent with due process, Metropolitan Edison's practice of terminating utility service upon allegation of default and without notice and prior opportunity to contest. The court of appeals has legitimized a procedure whereby the consumer's only alternatives, in response to a computerized dunning notice, are to accept termination or to pay a disputed account. Short of litigation after payment, the consumer is denied all

opportunity to dispute the computer's version of the facts.

This procedure is in direct conflict with the rule of due process as definitively set forth in Fuentes vs Shevin, supra. That decision declares that no significant interest, whether characterized as a traditional property form or as an entitlement, can be denied without opportunity for a hearing. Sniadach vs Family Finance Corp., 395 U.S. 337 (1969); Goldberg vs Kelly, supra at 539; Boddie vs Connecticut, 401 U.S. 371, 379 (1971).

Courts have recently held that the continued receipt of utility services is a property right and an entitlement which is subject to due process protections Davis vs Weir, 328 F.Supp. 317 (N.D., Ga., 1971), 359 F.Supp. 1023 (N.D., Ga. 1973); Palmer vs Columbia Gas Co., 479 F.2d 153 (C.A., 6, 1973); Stanford vs Gas Service Co., 346 F.Supp. 717 (D. Kan., 1973); Bronson vs Consolidated Edison Co., 250 F.Supp. 443 (S.D.N.Y., 1972).

To the extent that entitlement to utility service is a significant property interest, this Court's decisions unquestionably require notice and opportunity for hearing prior to termination.

> "[No] later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. "this Court has not . . . embraced the general proposition that a wrong may be done if it can be undone." Fuentes vs Shevin, supra at 82, citing Stanley vs Illinois, 405 U.S. 645, 647 (1972).

II. The Court of Appeals Has Decided The Important Federal Question of 'whether a Public Utility Acts Under Color of Law in Terminating Utility Services for Non Payment of a Disputed Bill' In a Manner That is In Conflict With Decisions of Other Courts of Appeals

The decision of the Court of Appeals in this action follows the analysis of the 7th and 9th Circuits. See Kadlec vs Illinois Bell Telephone Co., supra; Martin vs Pacific Northwest Bell Telephone Co., 441 F.2d 116, 118 (C.A. 9, 1972) (dismissal of telephone company employee); Particular Cleaners, Inc. vs Commonwealth Edison Co., 457 F.2d 189, 191 (C.A. 7, 1972), cert. denied No. 71-1420, 34 L.Ed.2d 148 (Oct. 10, 1972) (security deposit requirement as a condition precedent to service); Lucas vs Wisconsin Electric Power Co., 466 F.2d 638, 644, 656 (C.A. 7, 1973), cert. denied, No. 72-5621, 34 L.Ed.2d. 696 (Jan. 8, 1973). Each of these decision has adopted the narrow approach of

the Kadlec opinion which requires affirmative governmental authorization for challenged conduct to support a finding of action under color of law. Each of these decisions has discounted the significance of other recognized indices of state action. Each has thus legitimized arbitrary practices by public utility corporations.

In contrast, Courts of Appeals for the 6th and 8th Circuits have adopted that broad, conprehensive analysis of state action which was utilized by this court in Burton vs Wilmington Parking Authority, supra, and reaffirmed in Moose Lodge vs Irvis, supra. See Ihrke vs Northern States Power Co., 459 F.2d 566, 568, 569 (C.A. 8, 1972) cert. granted, vacated, dismissed as moot, No. 72-28, 34 L.Ed.2d 72 (October 10, 1972); Palmer vs Columbia Gas of Ohio, Inc., supra. These decisions have recognized that the issue of action under color of law is a function of a range of variables which demonstrate the scope and extent of government involvement with challenged conduct. In finding state action, each opinion has considered both the singular and cumulative effect of public function, substantial regulation, government created monopoly, and authorization or review of utility regulations. In addition, the Palmer decision has affirmed the District Court requirement of prior notice and opportunity for review, following the rule of Fuentes vs Shevin, supra.

The decisions outlined here have raised substantial issues concerning the exte to which the Fourteenth Amendment is to govern the conduct of regulated public utility corporations. However, given these conflicting opinions, each of which asserts its compliance with Burton, Moose Lodge, Goldberg, or Fuentes, virtually all consumers, public utility corporations, and regulatory agencies alike are faced with uncertainty. Moreover, these divergent decisions have resulted in sharply contrasting residential utility service practices. Compare, for example, the policy of Metropolitan Edison, which has been approved by the Third Circuit with that mandated by the Sixth Circuit in Palmer vs Columbia Gas, supra.

It must be noted also that these conflicting opinions generate litigation in the Districts. Without a definitive declaration by this Court, the number of actions will continue to expand as advocates seek resolution of the recurring questions presented in this petition. See generally, Davis vs Weir, 328 F.Supp. 317, 321; 359 F.Supp. 1023, 1025 (N.D., Ga., 1973) [residential utility service furnished by a municipal utility is an entitlement to be protected by the Fourteenth Amendment]; Jackson vs Northern States Power Co., 343 F.Supp. 265, 266, (D. Minn., 1972) [preliminary injunction issued against termination without prior notice and opportunity to contest]; Stanford vs Gas Service Co., 346 F.Supp. 717, 720, 721 (D., Kan., 1972) [regulated utility corporation cannot terminate residential utility service without due process]; Hattell vs Public Servic Co. of Colorado, 350 F.Supp. 240, 245 (D., Colo., 1972) [motion to dismiss for lack of state action denied]; Bronson vs Consolidated Edison Co. of New York, Inc., 350 F.Supp. 443, 446, 447 (S.D.N.Y., 1972) [regulated utility corporation cannot terminate residential utility service without due process]; Freeman vs Frye, Civil No. C-72-350 (N.D., Calif., 31 Oct. 1972) [residential utility service is an entitlement to be protected by the Fourteenth Amendment]; Babcock vs Schaffhauser, Civil No. 15300 (D., Conn., December 7, 1972) [stipulated agreement whereby municipal utility agrees to provide prior notice and opportunity to contest proposed termination]; Hanrihan vs Boston Edison Co. Civil No. 72-3900 (D., Mass., filed January 15, 1973) [preliminary injunction issued against termination without prior notice and opportunity to contest proposed termination]; Buffington vs Gas Service Co., Civil No. 206643-2 (W.D., Mo., W.D April 4, 1973) [regulated utility corporation cannot terminate residential utility service without due process]: Allen vs DPU, City of Richmond, Civil No. 403-72-R (E.D., Va., April 11, 1973) [municipal utility cannot terminate residential utility service without due process].

It is interesting to note that a court has found state action to exist under

circumstances and facts very similar to the instant case.*

Finally, it is to be noted that the courts that have found state action to exist have also found that such action constitutes a denial of due process of law. See Palmer vs Columbia Gas Co., supra; Stanford vs Gas Service Co., supra; Bronson vs Consolidated Edison Co., supra and Davis vs Weir, supra.

III. The Court of Appeals Has Decided an Important Federal Question Not Yet Decided By This Court, i.e., The Extent To Which a Public Utility Is to be Subject to the Requirements of the Due Process Clause

The conflicting District and Circuit Court decisions in utility due process case demonstrate both uncertainty and reluctance to apply constitutional restraints to the consumer practices of an industry which, until recently has been uncritically viewed as a private business. However, in light of this Court's recent decisions which have materially altered traditional creditor practices, it is necessary and proper to reconsider that conventional wisdom. Given the importance of due process safeguards as fundamental to the rule of law, this Court should determine whether a utility's private corporate label is to isolate it from the mandate of due process. Simply stated, this Court is asked to determine the significance of substantial governmental intervention into and involvement with the affairs of an industry which has been formerly regarded as a private business.

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* In Stanford vs Gas Service Company, supra, the Court found state action to exist because the monopoly utility was performing a public function in the public interest, and was also subject to extensive governmental regulation. The fact that the utility company employees could not enter upon private property was deemed immaterial. More significantly, the statute pursuant to which the utility was authorized to sever service in that case was very similar to a provision of the Pennsylvania Public Utility Code, relied upon by the Appellant herein, 66 P.S. §1341. The pertinent Kansas statute provided:

> "Power, authority and jurisdiction. The state corporation commission is given full power, authority and jurisdiction to supervise and control the public utilities . . . and is empowered to do all things necessary and convenient for the exercise of such power, authority and jurisdiction." KSA §66-101.

The comparable Pennsylvania statute provides:

> "Administrative authority of commission; regulation:
> The commission shall have general administrative power and authority to supervise and regulate all public utilities doing business within the Commonwealth. The commission may make such regulations, not inconsistant with the laws as may be necessary or proper in the exercise of its powers or for the performance of its duties under this act." 66 P.S. §1341.

Since 1969, four petitions, raising issues substantially similar to those herein have been denied or dismissed. Kadlec vs Illinois Bell Telephone Co., supra; Particular Cleaners vs Commonwealth Edison Co., supra; Ihrke vs Northern States Power Co., supra; Lucas vs Wisconsin Electric Co., supra. Given the importance of these questions and the uncertainty resulting from conflicting opinions below, a definitive review should be undertaken by this Court.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the decision of the Court of Appeal.

Respectfully submitted;

TRI-COUNTY LEGAL SERVICES

Alan Linder

Alan Linder, Esquire
Eugene F. Zenobi, Esquire
J. Richard Gray, Esquire

Attorneys for Petitioner

11/20/73

Date

APPENDIX I

Opinion of the United States District Court for the Middle District of Pennsylvania, Jackson vs Metropolitan Edison Company, 348 F.Supp. 954 (1972)

Catherine JACKSON, on behalf of Herself and All Others Similarly Situated

v.

METROPOLITAN EDISON COMPANY, a Pennsylvania corporation.

Civ. No. 71-455.

United States District Court, M. D. Pennsylvania.

June 30, 1972.

Civil rights complaint in forma pauperis filed by customer on behalf of herself and all others similarly situated seeking money damages and declaratory relief against utility which allegedly violated customer's constitutional rights when electrical services to her home were summarily terminated without prior notice or hearing on the merits. On a defense motion to dismiss the complaint, the District Court, Nealon, J., held that since the utility had acted pursuant to its own regulations and out of a purely private, economic motive, namely, the nonpayment of past due bills, and since no state official participated in the practice complained of, nor was it alleged that the state requested or cooperated in the suspension of services, the customer failed to make a sufficient showing of state involvement in the complained of activity to prevail against a motion to dismiss for lack of action under color of state law, regardless of the state requirement that the utility clearly spell out any penalties to be imposed for nonpayment of bills.

Motion granted and complaint dismissed.

1. Civil Rights ⇐13.12(2)

A complaint which relies on statute in part providing that every person who, under color of state law, subjects any citizen of the United Sates to the deprivation of any rights, privileges or immunities secured by the Constitution and laws shall be liable in an action at law or other proper proceeding must initially establish two elements; first, the conduct complained of must have been done under color of state law and, secondly, the conduct must deprive another of rights, privileges or immunities secured by the Constitution of the United States. 42 U.S.C.A. § 1983.

2. Civil Rights ⇐13.5(2)

In determining the presence of state action in a particular case involving an alleged deprivation of rights, a court must examine the facts and circumstances to see if conduct that was formerly private has become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action. 42 U.S.C.A. § 1983.

3. Federal Civil Procedure ⇐1781

Since utility, against which a complaint in forma pauperis was filed by customer who alleged that her constitutional rights had been violated when electrical services to her home were summarily terminated without prior notice, acted pursuant to its own regulations and out of a purely private, economic motive, namely, the nonpayment of bills, and since no state official participated in the activity, nor was it alleged that the state requested or cooperated in the suspension of services, the customer failed to make a sufficient showing of state involvement to prevail against a motion to dismiss for lack of action under color of state law, regardless of state requirement that a utility spell out any penalties to be imposed for nonpayment of bills. 42 U.S.C.A. § 1983; 66 P.S. Pa. §§ 1141, 1144, 1149, 1172, 1217, 1341, 1348.

Alan N. Linder, York, Pa., Richard A. Hesse, Director National Consumer Law Center, Chestnut Hill, Mass., for plaintiff.

Russell O'Malley, Irwin Schneider, Scranton, Pa., Ryan, Russell & McConaghy, Reading, Pa., for defendant.

J. Shane Creamer, Atty. Gen., Curtis Pontz, Deputy Atty. Gen., Dept. of Justice, Harrisburg, Pa., for Commonwealth of Pa.

MEMORANDUM AND ORDER

NEALON, District Judge.

On October 18, 1971, plaintiff filed a Civil Rights complaint in forma pauperis under 42 U.S.C. § 1983 [1] on behalf of herself and all others similarly situated seeking money damages and declaratory and injunctive relief against the defendant utility. Plaintiff alleges that her constitutional rights were violated when electrical services to her home were summarily terminated without prior notice or hearing on the merits. That same day a temporary restraining order was issued by this court enjoining defendant from terminating plaintiff's service until October 22, the day set for the hearing on the preliminary injunction. However, at the hearing on October 22, because of the short notice given to defendants, it was agreed between the parties that plaintiff's service was to be continued in order to allow defendant to respond to plaintiff's complaint. Subsequently, defendant moved to dismiss the complaint on the grounds that (1) the court lacks subject matter jurisdiction in that the defendant utility did not act under color of state law and (2) the complaint fails to state a cause of action on which relief can be granted. Numerous briefs having been filed, this motion is now before the court for decision.

In her complaint, plaintiff alleges that her service was terminated because she was unable to pay Metropolitan Edison for past due utility bills. Plaintiff disputes the validity of the bill in that she alleges that she is not wholly responsible

1. Any question as to the jurisdiction of this court under 28 U.S.C. § 1343 to the extent that it is alleged that a civil rights action lies only for alleged deprivation of personal rights as opposed to property rights was put to rest by the Supreme Court's recent decision in Lynch v. Household Finance Corp., 405 U.S. 538, 92 S.Ct. 1113, 31 L.Ed.2d 424 (1972).

for it since one James Dodson, a former co-occupant of the premises, is the party who originally subscribed for the services and had agreed to pay the bill. Finally, plaintiff contends that she has made several tenders of partial payments which were rejected by the utility company.

Metropolitan Edison's tariff, filed with the Pennsylvania Utility Commission, provides that the company, on reasonable notice, may discontinue utility services to a customer for nonpayment of utility bills.[2] However, the company's regulations do not require any type of hearing before the service is terminated. Plaintiff insists that the utility's failure to provide a hearing prior to termination constitutes a denial of due process of law. Plaintiff also alleges that because of her indigency she is unable to pay the bill and thus faces automatic termination, whereas a more affluent person could pay the challenged bill and then subsequently attack its validity. Such disparity of treatment, plaintiff claims, is in violation of the equal protection clause of the Fourteenth Amendment.

[1] It is well settled that a complaint which relies on 42 U.S.C. § 1983 must initially establish two elements. First, the conduct complained of must have been done under color of state law. Private action, however wrongful, cannot form the basis for relief under § 1983. Adickes v. S. H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); United States v. Price, 383 U.S. 787, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1966); Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961). Secondly, the conduct complained of must deprive another of rights, privileges, or immunities secured by the Constitution of the United States. See Adickes, *supra*. It is defendant's position in its motion to dismiss that the complaint is fatally defective as to one of these elements, since they insist that Metropolitan Edison did not act under "color of state law" within the meaning of § 1983.

Although the core concept of "state action" has been frequently discussed by the Supreme Court, an exact definition has never been formulated,

> ". . . to fashion and apply a precise formula for recognition of state responsibility . . . is an 'impossible task' which 'This Court has never attempted' . . . Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."

Burton v. Wilmington Parking Authority, 365 U.S. 715, 722, 81 S.Ct. 856, 860, 6 L.Ed.2d 45 (1961).

[2] Thus, in determining the presence of state action in a particular case, a court must examine the facts and circumstances of that case to see if

> "(c)onduct that is formerly 'private' (has) become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action."

Evans v. Newton, 382 U.S. 296, 299, 86 S.Ct. 486, 488, 15 L.Ed.2d 373 (1966).

In essence, the factors upon which plaintiff relies in establishing state action are that (a) the Commonwealth of Pennsylvania has granted Metropolitan Edison, as a privately-owned public utility, a monopoly in the distribution of electricity in the York area and (b) its daily operation is subject to the close supervision and regulation of the Pennsylvania Public Utility Commission. Specifically, plaintiff cites the P.U.C.'s power (1) to regulate and review rates established by the utility;[3] (2) to establish regulations necessary in the supervision of a utility doing business within Pennsylvania;[4] (3) to require that all rules and regulations adopted by the utilities themselves be subject to the approval of the P.U.C.;[5] (4) to provide for an inspection and access to any and all facilities and records of public utilities which the Commission deems necessary;[6] and (5) to prohibit discriminatory practices in rates[7] and services,[8] as demonstrating that the operation of Metropolitan Edison "is so intertwined with the state as to make it inseparable from it." Evans v. Newton, *supra* at 299, 86 S.Ct. 486. In addition, plaintiff maintains that the state is involved with the very activity complained of, i. e. the termination of service, in that Pennsylvania P.U.C. Tariff Regs. VIII provides that

> "Every public utility that [imposes] penalties upon its customers for failure to pay bills promptly shall provide in its filed tariffs a rule setting forth clearly the exact circumstances and conditions in which the penalties are imposed . . ."

On the other hand, defendant argues that the overwhelming weight of authority has held that merely because a private corporation, such as Metropolitan Edison, enjoys an economic monopoly which is supervised and controlled by a state-wide regulatory body does not necessarily bring its *every act* within the purview of Section 1983. *See e. g.* Martin v. Pacific Northwest Bell Telephone Co., 441 F.2d 1116 (9th Cir. 1971); Kadlec v. Illinois Bell Telephone Co., 407 F.2d 624 (7th Cir. 1969); Lucas v. Wisconsin Electric Power Co., 322 F.Supp. 337 (E.D.Wis.1970); Taglianetti v. New England Tel and Tel. Co., 81 R.I. 351, 103 A.2d 67 (1954). Defendant contends that in order for state action to exist in the instant case "the state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with *the activity that caused the injury.*" (emphasis added) *See* Martin v. Pacific Northwest Bell Telephone Co., *supra*, 441 F.2d at 1118. Kadlec v. Illinois Bell Telephone Co., *supra Cf.* Powe v. Miles, 407 F.2d 73, 81 (2d Cir. 1968).[9] I agree.

In Kadlec v. Illinois Bell Telephone Co., *supra*, perhaps the leading case dealing with the question of state action as applied to a regulated public utility, the Seventh Circuit Court of Appeals affirmed a dismissal of a Civil Rights complaint against a telephone company which charged that the company had unconstitutionally terminated certain of plaintiff's commercial telephone services, finding that the termination had not been done under color of state law. The Court held that the acts of the telephone company, taken pursuant to its own regulations, could not be regarded as acts done under color of law simply because the company's regulations had been filed with and approved by an agency of the state. The court elaborated:

> "Motivated by purely private economic interests and pursuant to its *own regulations*, Illinois Bell terminated plaintiffs' Call-Pak service. The only apparent state connection with the termination rests in the fact that defendant company filed its regulations with state authorities; the state in no sense benefited from, encouraged, re-

2. In Tariff No. 41 of the Metropolitan Edison Company, filed with the Pennsylvania Public Utility Commission, Rule 15 provides: "Company reserves the right to discontinue its service on reasonable notice and to remove the equipment in case of nonpayment of bill of violation of the Pennsylvania Public Utility Commission's or Company's Rules and Regulations;

3. 66 P.S. §§ 1141, 1144, 1149.

4. 66 P.S. § 1341.

5. 66 P.S. § 1172.

6. 66 P.S. §§ 1217, 1348.

7. 66 P.S. § 1144.

8. 66 P.S. § 1172.

9. Support for this contention is found in Burton v. Wilmington Parking Authority, *supra*, where the court held that "(t)he State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a *joint participant in the challenged activity*, which, on that account, cannot be considered to have been so 'purely private' as to fall within the scope of the Fourteenth Amendment." (emphasis supplied)

quested or co-operated in this suspension of service."

". . . . Here, the nexus between the state and defendant's conduct was not sufficient to maintain an action under § 1983."

407 F.2d at 626.[10]

[3] The only apparent state involvement with the activity complained of here is in Tariff Reg. VIII of the Pennsylvania P.U.C. which requires that every utility that imposes penalties on its customers for failure to pay bills promptly shall clearly set forth in their tariff the exact conditions under which the penalties are to be imposed. However, the mere requirement that Metropolitan Edison clearly spell out any penalties it will impose for non-payment of bills does not clothe Metropolitan Edison with state authority nor transform the defendant's regulations into acts of the state.[11] Rather, the purpose of Tariff Reg. VIII is to insure that public utilities inform their patrons of any possible penalty for failing to pay their bills. As in *Kadlec*, defendant here acted pursuant to its own regulations and out of a purely private, economic motive. No state official participated in the practice complained of, nor is it alleged that the state requested or co-operated in the suspension of service. Thus, plaintiff has failed to make a sufficient showing of state involvement in the activity complained of to prevail against defendant's motion to dismiss. Accordingly, the complaint will be dismissed.

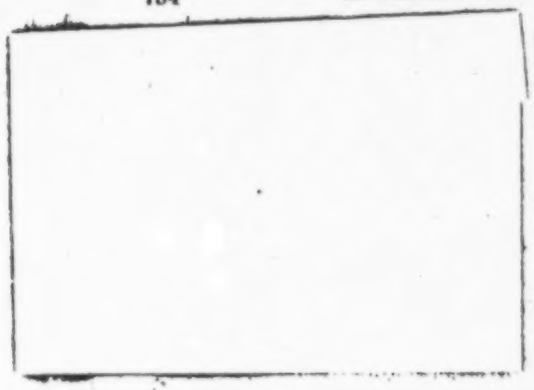
Because of the view I take of this case, it will be unnecessary to consider the merits of plaintiff's contention that her services were terminated in violation of her constitutional rights. I note in passing, however, that plaintiff submitted no evidence indicating disparity of treatment which constituted a denial of equal protection of the law.

10. More recently, in another context, the Supreme Court considered the question of whether a state's regulatory scheme constituted state action and noted that the Court has never held that state regulation in any degree whatever would implicate the state in private conduct but would require significant involvement in the proscribed activity. The Court stated that "(h)owever detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination . . . (n)or can it be said to make the State in any realistic sense a partner or even a joint venturer in the Club's enterprise". Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 176-177, 92 S.Ct. 1965, 1973, 32 L.Ed.2d 627 (1972).

11. This does not mean, of course, that the State may not, by regulation, require a hearing before service may be terminated by a public utility. While such a regulation may be laudable, it is not constitutionally required.

APPENDIX II

Opinion of the United States Court of Appeals for the Third Circuit, Jackson vs Metropolitan Edison Company, Civil No. 72-1745 (21 August 1973) 483 F.2d 754 (3rd Cir., 1973)



Catherine JACKSON, on behalf of herself and all others similarly situated, Appellant,

v.

METROPOLITAN EDISON COMPANY, a Pennsylvania corporation.

No. 72-1745.

United States Court of Appeals, Third Circuit.

Argued May 4, 1973.

Decided Aug. 21, 1973.

Civil rights complaint by customer on behalf of herself and all others similarly situated seeking money damages and declaratory relief against utility which allegedly violated customer's constitutional rights when electrical service to her home was summarily terminated without prior notice or hearing on the merits. The United States District Court for the Middle District of Pennsylvania, William J. Nealon, Jr., J., dismissed the complaint, 348 F.Supp. 954, and appeal was taken. The Court of Appeals, Weis, Circuit Judge, held that since utility acted pursuant to its own regulations and out of a purely private economic motive, namely the nonpayment of bills, and since no state official participated in the activity, customer failed to make a sufficient showing of state involvement to prevail against motion to dismiss for lack of action under color of state law.

Affirmed.

James Hunter, III, Circuit Judge, was present at argument but did not participate in the decision.

1. Civil Rights ⇨13.5(2)

Generally there may be a finding of "state action or action under color of state law," within meaning of civil rights statute, when a private party's action occurred in conjunction with the business in which the state may be considered a partner or joint venturer in a profit-making field, when a state statute or custom or usage compels the result, when a state agency affirmatively orders or specifically approves the activity in the course of its regulatory rule making, or when a private agency in effect is acting on behalf of and furnishing a typical government service. 42 U.S.C.A. § 1983.

See publication Words and Phrases for other judicial constructions and definitions.

2. Constitutional Law ⇨296(1)

Procedure requiring utility customer to sue for refund after payment of amount claimed to be due the utility, in order to avoid shutoff of service does not violate due process. U.S.C.A.Const. Amend. 14.

3. Corporations ⇨382½

The right to receive utility service does not rise to the level of a constitutional right or an entitlement from the state.

4. Corporations ⇨382½

Right of a customer to receive utility service pending resolution of a dispute between customer and utility is not protected by the Constitution.

5. Federal Civil Procedure ⇨1781

Since utility, against which complaint was filed by customer who alleged that her constitutional rights had been violated when electrical service to her home was summarily terminated without prior notice, acted pursuant to its own regulations and out of a purely private, economic motive, namely the nonpayment of bills, and since no state official participated in the activity, nor was it alleged that state requested or cooperated in the suspension of services, customer failed to make a sufficient showing of state involvement to prevail against a motion to dismiss for lack of action under color of state law. 42 U.S.C.A. § 1983; 66 P.S.Pa. § 1101 et seq.

Alan N. Linder, Tri-County Legal Services, York, Pa., for appellant.

Russell J. O'Malley, Paul A. Barrett, Nogi, O'Malley & Harris, Scranton, Pa., for appellee (Samuel B. Russell, Ryan, Russell & McConagley, Reading, Pa., of counsel).

James R. Adams, Edward J. Weintraub, Deputy Attys. Gen., for Com. of Pa., as amicus curiae.

Edward J. Dailey, National Consumer Law Center, Inc. as amicus curiae.

Jonathan M. Stein, I. David Pincus, David J. Ackerman, Philadelphia, Pa., Fellowship Commission's Committee on Consumer and Citizen Complaints, as amicus curiae.

Before HUNTER * and WEIS, Circuit Judges, and SCALERA, District Judge.

OPINION OF THE COURT

WEIS, Circuit Judge.

Whether the Civil Rights Act was violated when an electric utility shut off service to its customer is the issue to be decided in this case.

The defendant is a privately owned and operated Pennsylvania corporation, granted a monopoly to deliver electricity to the populace in the area of York, Pennsylvania. Like similar utilities in Pennsylvania, it is subject to the provisions of the Public Utility Code [1] and the regulations of the Public Utility Commission authorized by the Act.

The plaintiff was a residential customer of the Metropolitan Edison Company and in October of 1971 was claimed to have owed the defendant for past due bills. She disputed the validity of the charges, asserting that a former co-occupant of the premises was responsible for the amount due. Despite several tenders by the plaintiff of partial payments, the defendant terminated service on October 11, 1971 by disconnecting the line on the company's utility pole on the street near the plaintiff's house. The plaintiff then filed suit under the Civil Rights Act, 43 U.S.C. § 1983,[2] asking both damages and injunctive relief.

The district court held an evidentiary hearing on the request for a preliminary injunction. The plaintiff testified that on an occasion about a year previously when the electricity had been disconnected, she left her home for about 45 minutes to telephone the utility and when she returned, the power had been restored. She admitted not receiving bills in the ensuing year but claimed that one Dodson, the co-occupant of the house, had received and paid monthly statements from the defendant.

Although Dodson left the premises about August, 1971, the plaintiff admitted that no bills were received at her home thereafter. She testified that on October 6, 1971 a representative of Metropolitan came to the house inquiring

* Judge Hunter was present at the argument of this case but did not participate in the decision.

[1] 66 Purdon's (Pennsylvania) Statutes §§ 1101 *et seq.*

[2] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunity secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

about Dodson and on the following day another employee looked at the meter and told her that somebody had tampered with it. The plaintiff then asked that service be reinstated in the name of Robert Jackson. At the hearing she admitted that this was in fact her 12 year old son.

At the conclusion of the plaintiff's testimony and after the filing of briefs, the district court dismissed the case because there was not "a sufficient showing of state involvement in the complained of activity . . . ."[3]

The plaintiff asserts that the defendant's action in arbitrarily terminating service to her was under color of state law because:

1. As a utility, the defendant was closely regulated by the Commonwealth of Pennsylvania;
2. In supplying electricity, Metropolitan Edison was performing a governmental function;
3. The defendant was either acting as an agent for the state or a joint participant with it; and
4. The failure to act by the state amounted to "state action".

Litigation between utilities and their customers based on § 1983 has been the subject of decisions in the Courts of Appeals of the Eighth, Seventh, and Sixth Circuits, as well as a number of district courts. While on the facts the situations in the reported cases are capable of distinction, an objective appraisal might suggest that the differing results represent a continued uncertainty as to the application of the "color of state law" test.

The Supreme Court has frankly admitted the difficulty of drawing guidelines, and in Moose Lodge 107 v. Irvis, 407 U.S. 163, 172, 92 S.Ct. 1965, 1971, 32 L.Ed.2d 627 (1972), Justice Rehnquist wrote:

"While the principle is easily stated, the question of whether particular discriminatory conduct is private, on the one hand, or amounts to 'State action,' on the other hand, frequently admits of no easy answer. 'Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.'"

While the *Moose* case was concerned with a private club rather than a utility, the following quote is helpful:

"The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever. Since state-furnished services include such necessities of life as electricity, water, and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from State conduct set forth in the *Civil Rights Cases*, *supra*, and adhered to in subsequent decisions."

The Supreme Court went on the discuss the multiform variety of control that the state exercised over the holder of a liquor license which the district court had described as "pervasive" and went on to say:

"However detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination. Nor can it be said to make the State in any realistic sense a partner or even a joint venturer in the club's enterprise."

The Court thus recognizes the importance of a connection between the state regulation and the proscribed conduct.

Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961), presented a situation where the Court felt that a state agency which leased premises to a restauranteur became a joint-venturer or partner, in a sense, in the enterprise and therefore shared in the discriminatory policies of

3. 348 F.Supp. 954 (M.D.Pa.1972).

the private concern. Furthermore, in that case the plaintiff could point to a specific state statute which was said to permit the offending conduct.

Adickes v. Kress, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970), also was concerned with conduct of a private enterprise said to be in violation of § 1983. The Court there pointed out that the involvement of a policeman in a conspiracy situation provides the necessary ingredient of state action in a claim of violation of the Fourteenth Amendment, whether or not the actions of the officer were officially authorized. The Court also said:

"Whatever else may also be necessary to show that a person has acted 'under color of [a] statute' for purposes of § 1983 . . . we think it essential that he act with knowledge of and pursuant to the statute." (At pp. 161, 162, f.n. 23, 90 S.Ct. at pp. 1598, 1611)

The Court noted also that a state is responsible for the discriminatory act of a private party if the state by its law has compelled the act.

Public Utility Commission v. Pollak, 343 U.S. 451, 72 S.Ct. 813, 96 L.Ed. 1068 (1952), found "state" involvement where the Commission after conducting hearings affirmatively approved the action which was held to be objectionable. The Court said very specifically and clearly:

". . . we do not rely on the mere fact that Capital Transit operates a public utility . . . Nor do we rely upon the fact that . . . Capital Transit now enjoys a substantial monopoly of street railway . . ."

Pollak, therefore, is not authority for the holding that the actions of a public utility which enjoys a monopoly, *ipso facto*, are those of a state agency, nor does it hold that all activities conducted under the auspices of a utility regulatory body satisfy the "color of state law" test.

[1] Though it is difficult to summarize in this complex field and without intending to be all inclusive, it may be said generally that there may be a finding of state action or action under color of state law:[4]

1. When a private party's action occurred in conjunction with a business in which the state may be considered a partner or joint venturer in a profit making field (Burton v. Wilmington, *supra*); or
2. when a state statute or custom or usage compels the result (Adickes v. Kress, *supra*); or
3. when a state agency affirmatively orders or specifically approves the activity in the course of its regulatory rule making (Public Utility Commission v. Pollak, *supra*); or
4. when a private agency in effect is acting on behalf of and furnishing a typical government service (Marsh v. Alabama, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946)).

A brief discussion of the regulatory plan under which the defendant Metropolitan operates is helpful in deciding whether it falls within any of the categories outlined.

The rates which the defendant charges its customers are regulated by and must be approved by the Public Utility Commission. Additionally, the Commission is empowered to issue regulations necessary for supervision of utilities doing business in Pennsylvania, including provisions for inspection and access to facilities and records of the company as the Commission thinks necessary. The Commission is charged with prohibiting discriminatory practices in rates and services, and all rules and reg-

4. While it has been suggested that "state action" and "action under color of state law" are synonymous, U. S. v. Price, 383 U.S. 780, 794, f.n. 7, 86 S.Ct. 1152, 16 L.Ed. 2d 267 (1966), at least one court has indicated its belief that the "color of state law" test may be more demanding. Lavoie v. Bigwood, 457 F.2d 7 (1st Cir. 1972).

ulations of the utilities are subject to its approval.

As part of the rate-setting procedure, the utility must file a tariff with the Commission in compliance with its rules. The Commission Regulation on Tariffs, § VIII, provides that:

"Every public utility that [imposes] penalties upon its customers for failure to pay bills promptly shall provide in its filed tariffs a rule setting forth clearly the exact circumstances and conditions in which the penalties are imposed . . ."

Pursuant to the regulation, the defendant filed in Tariff No. 41, its Rule 15 (issued April 30, 1971, effective June 30, 1971):

"Company reserves the right to discontinue its service on reasonable notice and to remove its equipment in case of non-payment of bills or violation of the Pennsylvania Utility Commission's or Company's rules and regulations; or, without notice, for abuse, fraud, or tampering with the connections, meters, or other equipment of company."

Since the record is silent on the point, we assume that no objection was raised to this particular provision of the tariff and, therefore, there was no hearing before the PUC which would have required affirmative action by that body such as occurred in the Pollak case.

While the tariff purports to give the company the right of re-entry upon the customer's premises for purpose of removing its equipment after termination of service, it seems clear from the record that such action was not taken in this case. The service was disconnected by the defendant at its pole, some distance removed from the home of the plaintiff.

Thus the action of the company in terminating service in this case was taken pursuant to its own regulations using its own personnel without entering onto the customer's private property, without utilizing any state statute or regulation permitting re-entry on the customer's premises, and without any specific direction or authorization of the regulatory body.

The factual background in this case is quite similar to that in Lucas v. Wisconsin Electric Power Company, 466 F.2d 638 (7th Cir. 1972), cert. denied, 409 U.S. 1114, 93 S.Ct. 928, 34 L.Ed.2d 696 (1973), where the Court of Appeals for the Seventh Circuit, sitting en banc, held that there had not been action under color of state law and said:

"The 'under color of' provision encompasses only such private conduct as is supported by state action. That support may take various forms, but it is quite clear that a private person does not act under color of state law unless he derives some 'aid, comfort, or incentive,' either real or apparent, from the state. Absent such affirmative support, the statute is inapplicable to private conduct.

"We believe that affirmative support must be significant, measured either by its contribution to the effectiveness of defendant's conduct, or perhaps by its defiance of conflicting national policy, to bring the statute into play (466 F.2d pp. 655, 656). . . . we believe the significance of that support must be evaluated to determine whether it brings § 1983 into play; otherwise the federal statute would soon supersede vast areas of state administrative regulation." (466 F.2d p. 657)

The Court concluded that the monopoly factor did not in a practical way deprive the customer of an effective remedy nor did it add the necessary state support to private conduct so as to transform an issue of state regulatory policy into a civil rights case.

The Court's action thus affirmed its earlier ruling in Kadlec v. Illinois Bell Telephone, 407 F.2d 624 (7th Cir. 1969), cert. denied, 396 U.S. 846, 90 S.Ct. 90, 24 L.Ed.2d 95 and was consistent with Particular Cleaners v. Commonwealth Edison, 457 F.2d 189 (7th Cir. 1972). *See also*, Martin v. Pacific Northwest

Bell Telephone Co., 441 F.2d 1116 (9th Cir. 1971), where that Court said:

"The fact that a private corporation, such as Pacific Bell, enjoys an economic monopoly which is protected and regulated by the state does not necessarily bring its every act within the purview of Section 1983. [citation], for as well stated in Powe v. Miles, 407 F.2d 73, 81 (2d Cir. 1968), 'the state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury.'"

In Palmer v. Columbia Gas Company, 479 F.2d 153 (1973), a panel of the Court of Appeals for the Sixth Circuit came to a contrary conclusion in a situation where the utility availed itself of a right of entry on the customer's property, that privilege having been granted by a state statute.[5]

The color of state law test was found to have been satisfied in Ihrke v. Northern States Power Company, 459 F.2d 566 (8th Cir. 1972), reversed on mootness, 409 U.S. 815, 93 S.Ct. 66, 34 L.Ed. 2d 72 (1972), where the city which regulated the utility also received 5% of the company's gross earnings. In that instance it might well be said that while the city did not collect the utility bills, it shared directly in them and to some extent was a joint venturer with the power company.[6]

While the Supreme Court in the *Moose Lodge* case refused to prohibit racial discrimination in a private club setting finding no state action in the extensive regulation of the Liquor Control Board, a differing result was reached in *Burton, supra*, where a public restaurant was involved but less state control was evident. It may well be that the underlying reasoning for the differing results in the two cases is that in *Moose Lodge* the national prohibition against racial discrimination had come into conflict with the fundamental right of free association, while in *Burton* the tension arose between discrimination and the freedom to operate a business which should have been open to the public at large. In this analysis, it is not at all clear that the result in *Moose Lodge* would not have been different had the discriminating defendant been a public utility rather than a private club.

It is important, therefore, that the issues here be considered not only on the premise of color of state law but that there be an examination and evaluation of the underlying federal rights of the parties, particularly those which the plaintiff espouses.[7] While the plaintiff and *amici* speak of utility service as being "indispensable to life and health" and termination of those services as depriving her of the very "means and necessities of life," we think those characterizations are extreme and serve only to becloud the real issues.[8]

Granted that in today's urban society the supply of electricity to a home does much to make life more comfortable and

5. The Lucas court placed emphasis upon the lack of entry upon the resident's premises and implied that its decision might have been different had the utility availed itself of the state statute to enter the customer's home in order to cut off the power.

6. *See also* Stanford v. Gas Service Co., 346 F.Supp. 717 (D.C.Kan.1972); Hattell v. Public Service Co. of Colorado, 350 F.Supp. 210 (D.C.Colo.1972); Bronson v. Consolidated Edison, 350 F.Supp. 413 (S.D.N.Y. 1972). The fact situations in many of the cases present instances of callous and overbearing conduct by personnel of large utilities, familiar examples of the abuse of authority by those who have little of it. Decisions in favor of the plaintiff in such instances carry strong emotional appeal but are not necessarily persuasive legal authority on the applicability of § 1983. We are not convinced that state courts or the PUC in Pennsylvania would not issue appropriate orders in such outrageous situations as those detailed in Bronson and Palmer, *supra*.

7. *See* Williams, The Twilight of State Action, 41 Texas L.R. 347 (1963).

8. *See* Abernathy, Expansion of the State Action Concept under the Fourteenth Amendment, 43 Cornell Law Quarterly 375, 405 (1958).

convenient, its absence in the usual situation does not pose an immediate threat to the life of the occupants. The fact that people, even today, manage to carry on their lives in isolated areas without electricity is proof enough of that.

There is a clear distinction between depriving a community of power where disastrous results might occur if hospital, water purification, and communications facilities were interrupted and the situation in a dwelling when the absence of electrical energy would require manual operation of furnace controls, illumination by kerosene lantern, or refrigeration by ice. We do not minimize the inconvenience of the absence of electrical service or deny that special circumstances may result in serious consequences but simply indicate doubt with the flat assertion that failure to provide this form of energy to a home is a threat to life itself. It is probably more accurate to say that the service is essential to the kind of life we are accustomed to, particularly in an urban society.

Furthermore, as convenient as this utility service is, as desirable as its continuation may be, and as dependent on it we may believe ourselves to be because of its availability and benefits, the fact remains that as of this time at least, the state is not obligated to furnish electricity without charge to its citizens.[9] Those who wish to avail themselves of it must pay for it.[10]

This premise the plaintiff does not dispute here, nor does she deny that if it is proved that she is mistaken in her sition on the contested bill, she must it or do without electricity.

Clearly then, the right for which plaintiff now contends is to continue receive the service and, we assume, for it on a current basis until such t as a decision can be had on the dispu items.

The utility's response is that plaintiff may pay the contested cha and then claim for a refund. This p ess, it is assumed, may be handled inf mally and perhaps without the neces of going to court.[11] Though not expl itly stated as such, there is an under ing premise in plaintiff's position t because her income is limited to p ments made by the Department of Pu lic Welfare, the refund claim process not a practical alternative to her. If are to accede to this contention thou it should apply to every indigent pers not only as to past due bills, but curre ones as well. While there may be arg ment that this would be a socially des able development,[12] it has not yet be suggested as a constitutionally mandat one or one compelled by congressio enactment.

Plaintiff also asserts that she shou be given reasonable notice before h service is terminated. But the defen ant has already agreed with that prop sition—its tariff provides that "reaso able notice must be given befo termination."[13] She thus has been give that right which can be enforced in th state courts or by the Public Utilit Commission—at certainly no more c

9. Shelton, The Shutoff of Utility Services for the Poor, 46 Washington L.R. 745, comments that the state of Washington by constitution and statute permits free service to indigents, but apparently there are no requirements that it in fact be done.

10. *See* the discussion in Michelman, The Supreme Court 1968 Term, Foreward: On Protecting the Poor Through The Fourteenth Amendment, 83 Harvard L.R. 7 (1969).

11. While it has been asserted that few of these cases result in litigation because of costs and the small amount involved, we point out that the district magistrates Pennsylvania and the Small Claims Tri nals of the Common Pleas Court offer portunities for the customer to present case at little expense and without the nec sity of employing counsel.

12. *See* Shelton, *supra*, f. n. 9.

13. Plaintiff has not raised in brief or arg ment any objection to the provision in th tariff reserving the right to discontin without notice in the event that there ha been tampering with the meter by the cu tomer. Since there is no evidence that it i applicable here, we do not consider it.

pense or inconvenience than resort to the district court required.

Again, we note that the termination of the electricity did not occur until after the plaintiff had been contacted by two representatives of the defendant and had been made aware of irregularities in her account.

[2] Essentially then, if the plaintiff is to prevail, she must establish that the procedure of suing for refund after payment of the amount claimed to be due is a violation of due process.

While this method of resolving disputes may be harsh and undesirable, we cannot say that it is unconstitutional. Flora v. United States, 362 U.S. 145, 80 S.Ct. 630, 4 L.Ed.2d 623 (1960), discusses the history and procedures of collection of revenues due the United States which in many instances involves payment of the tax first and then filing a suit for refund. *See also* Great Lakes Dredge & Dock Company v. Huffman, 319 U.S. 293, 63 S.Ct. 1070, 87 L.Ed. 1407 (1943), where the Court did not disapprove a similar procedure in a state tax collection matter.

There has never been any indication from the Supreme Court that this procedure does not comport with constitutional requirement of due process. The reason given for such drastic procedures, that is, that the revenue must be collected in order to keep the government in operation, is the very same argument the utilities invoke as grounds for requirement of payment before further service is rendered.

[3] Plaintiff maintains, also, that because of its importance to everyday living, the right to receive utility service rises to the level of a constitutional right or an entitlement from the state.[14] She cites Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971), as expository of the doctrine that a person may not be deprived of a privilege or right by the state without a hearing. But while that case provides that the state is limited in the procedures that it may use to revoke or suspend an existing driver's license, there is no compulsion to issue one without payment of the customary fee. Moreover, we think that the wrong criterion has been applied. All of life's vital concerns have not been entrusted to the central government, and many, if not most, repose in the state or its agencies. Even so fundamental a human requirement as that of decent shelter has been said not to have a specific constitutional guarantee. Thus, in Lindsey v. Normet, 405 U.S. 56, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972), the Court said:

"We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality, or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease without the payment of rent or otherwise contrary to the terms of the relevant agreement."

The *Lindsey* case dealt with a summary form of eviction used in Oregon which required payment by the tenant in order to maintain possession and required that any defenses other than payment be reserved to a separate suit. Thus, it is akin to the theory used by the utility in this case, that is, pay first

14. The "entitlement" cases generally deal with a privilege or right conferred by the state of something which it alone can grant, e. g., in Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971), only the state, not a private company, can issue a driver's license; only a state by appropriation and legislative action may administer and disburse welfare benefits, Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed. 2d 287 (1970). Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1971), was concerned with the effect of state statutes on the owner's right of possession of personalty. We do not believe that there is a property right to be furnished utility service without payment.

and litigate later. The Supreme Court in the *Lindsey* case found no constitutional objection to such a procedure.[18]

So, too, in San Antonio Independent School District v. Rodriguez et al., 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973), a case dealing with the admittedly important role of education in our society, the Court said:

> "But the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause."

And so, although the plaintiff's position has strong appeal, that is not enough to establish a constitutional basis. We must be alert to the fact that in granting a federal remedy to what is essentially a state problem, there is a further extension of the power of the central government. Intervention is justified in some instances and indeed may be an absolute necessity at times, but such action should not be taken without recognizing the effect there may be upon the concept espoused by the framers of the Constitution that one of the best ways to prevent excessive and abusive government is to disperse its power among many entities and at various levels.

A reluctance, therefore, to enlarge the authority of the federal courts should not simply be viewed as a lack of appreciation for the rights of the individual but, rather, as an indication of concern for the most appropriate method of maintaining the proper balance between governmental power and the citizen's liberties.

Of course, much depends upon the circumstances, and in this case we find no overriding justification for utilization of the Civil Rights Act to intrude the federal courts into what is and should remain a state regulatory process.

[4] Simply stated, we do not find that a right to receive utility service pending resolution of a dispute between a customer and the company is protected by the Constitution of the United States.

[5] Thus, although we would find that there is no federally protected right involved here, we agree with the approach of the district court in applying a narrow view of the "color of state law" test in the weighing and sifting process in the circumstances of this case.[19] We find no error in the decision of the learned District Judge, and the judgment of the District Court, therefore, will be affirmed.

18. The fact that we find no constitutional prohibition to this procedure does not mean that we approve it or recommend it. If we were free to substitute our judgment for that of the PUC and the state legislature, we would require the utility to continue service on payment of current charges while the disputed matters are litigated and allow a time payment arrangement for financially

APPENDIX III

Statutes and Regulations

1. Pennsylvania Public Utility Code

Purden's Pennsylvania Statutes, Title 66

a. §452. Commission established; terms of office; qualifications of members; chairman; compensation; quorum

(a) A commission to be known as the Pennsylvania Public Utility Commission is hereby created. The commission shall consist of five members who shall be appointed by the Governor, by and with the advice and consent of two-thirds of all the members of the Senate. The commissioners first appointed under this act, shall continue in office for terms of two, four, six, eight, and ten years, respectively, from the effective date of this act, but their successors shall each be appointed for a term of ten years. No commissioner, upon the expiration of his term as aforesaid, shall continue to hold office until his successor shall be duly appointed or shall be qualified. Each commissioner, at the time of his appointment and qualification, shall be a resident of the Commonwealth of Pennsylvania, and shall have been a qualified elector therein for a period of at least one year next proceding his appointment, and shall also be not less than thirty years of age.

(b) A member designated by the Governor shall be the chairman of the commission during such member's term of office. When present, the chairman shall preside at all meetings, but in his absence a member, designated by the chairman, shall preside and shall exercise, for the time being, all the powers of the chairman.

(c) Each of the commissioners shall receive an annual salary of nineteen thousand dollars ($19,000.00), except the chairman, who shall receive an annual salary of twenty thousand dollars ($20,000.00).

(d) Three members of the commission shall constitute a quorum who, for all purposes, including the making of any order or the ratification of any act done or order made by one or more of the commissioners, must act unanimously. 1937, March 31, P.L. 160, §1; 1943, March 31, P.L. 32, §1; 1949, March 31, P.L. 369, No. 32, §1, 1957, July 16, P.L. 949, No. 408, §1.

b. §1101. Short title

This Act shall be known and may be cited as the "Public Utility Law". 1937, May 28, P.L. 1053, Art. I §1.

c. §1123. Certificates of Convenience

(a) Every application for a certificate of public convenience shall be made to the commission in writing, be verified by oath or affirmation, and be in such form, and contain such information, as the commission may require by its regulations. A certificate of public convenience shall be granted by order of the commission, only if and when the commission shall find or determine that the granting of such certificate is necessary or proper for the service, accomodation, convenience, or safety of the public; and the commission, in granting such certificate, may impose such conditions as it may deem to be just and reasonable. In every case, the commission shall make a finding or determination in writing, stating whether or not its approval is granted. Any holder of a certificate of public convenience, exercising the authority conferred by such certificate, shall be deemed to have waived any and all objections to the terms and conditions of such certificate.

(b) For the purpose of enabling the Commission to make such findings or determinations, it shall hold such hearings, which shall be public, and, before or after such hearing, it may make such inquiries, physical examinations and estimates of cost, as it may deem necessary or proper in enabling it to reach a finding or determination.

d. §1141. Rates to be just and reasonable

Every rate made, demanded, or received by any public utility, or by any two or more public utilities jointly, shall be just and reasonable, and in conformity with regulations or orders of the commission; Provided, That only public utility service being furnished or rendered by a municipal corporation, or by the operating agencies of any municipal corporation, beyond its corporate limits, shall be subject to regulation and control by the commission as to rates, with the same force, and in like manner, as if such service were rendered by a public utility. 1937, May 28, P.L. 1053, art. III, §301; 1939, March 21, P.L. 10, No. 11, §2.

e. §1142. Tariffs; filing and inspection

Under such regulations as the commission may prescribe, every public utility shall file with the commission, within such time and in such form as the commission may designate, tariffs showing all rates established by it and collected or enforced, or to be collected or enforced, within the jurisdiction of the commission. The tariffs of any public utility also subject to the jurisdiction of a Federal regulatory body shall correspond, so far as practicable, to the form of those prescribed by such Federal regulatory body. Every public utility shall keep copies of such tariffs open to public inspection under such rules and regulations as the commission may prescribe. 1937 May 28, P.L. 1053, art. III, §302.

f. §1144. Discrimination in rates

No public utility shall, as to rates, make or grant any unreasonable preference or advantage to any person, corporation, or municipal corporation, or subject any person, corporation, or municipal corporation to any unreasonable prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates, either as between localities or as between classes of service. Unless specially authorized by the commission, no public utility shall make, demand, or receive any greater rate in the aggregate for the transportation of passengers or property of the same class, or for the transmission of any message or conversation for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or any greater rate as a through rate than the aggregate of the intermediate rates. Nothing herein contained shall be deemed to prohibit the establishment of reasonable zone or group systems, or classifications of rates or, in the case of common carriers, the issuance of excursion, commutation, or other special tickets, at special rates, or the granting of nontransferable free passes, or passes at a discount to any officer, employee, or pensioner of such common carrier. No rate charged by a municipality for any public utility service rendered or furnished beyond its corporate limits shall be considered unjustly discriminatory solely by reason of the fact that a different rate is charged for a similar service within its corporate limits. 1937, May 28, P.L. 1053, art. III, §304.

g. §1171. Character of Service and Facilities

Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable services and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accomodation, convenience, and safety of its patrons, employees, and the public. Such service also shall be reasonably continuous and without unreasonable interruptions or delay. Such service and facilities shall be in conformity

with the regulations and orders of the commission. Subject to the provisions of this act and the regulations or orders of the commission, every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service. Any public utility service being furnished or rendered by a municipal corporation beyond its corporate limits shall be subject to regulation and control by the commission as to service and extensions, with the same force and in like manner as if such service were rendered by a public utility. 1937, May 28, P.L. 1053, art. IV, §401.

h. §1172. Discrimination in Service

No public utility shall, as to service, make or grant any unreasonable preference or advantage to any person, corporation, or municipal corporation, or subject any person, corporation, or municipal corporation to any unreasonable prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to service, either as between localities or as between classes of service, but nothing herein contained shall be deemed to prohibit the establishment of reasonable classifications of service. 1937, May 28, P.L. 1053, art. IV, §402.

i. §1182. Standards of service and facilities

The commission may, after reasonable notice and hearing, upon its own motion or upon complaint, prescribe as to service and facilities, including the crossing of facilities, just and reasonable standards, classifications, regulations, and practices to be furnished, imposed, observed, and followed by any or all public utilities; prescribe adequate and reasonable standards for the measurement of quantity, quality, pressure, initial voltage, or other condition pertaining to the supply of the service of any and all public utilities; prescribe reasonable regulations for the examination and testing of such service, and for the measurement thereof; prescribe or approve reasonable rules, regulations, specifications, and standards to secure the accuracy of all meters and appliances for measurement; and provide for the examination and testing of any and all appliances used for the measurement of any service of any public utility. 1937, May 28, P.L. 1053, art. IV, §412; 1938, Sp. Sess., Sept. 28,P.L. 44, §1.

j. §1183. Regulation of Service

Whenever the commission, after reasonable notice and hearing, upon its own motion or upon complaint, finds that the service or facilities of any public utility are unreasonable, unsafe, inadequate, insufficient, or unreasonably discriminatory, or otherwise in violation of this act, the commission shall determine and prescribe, by regulation or order, the reasonable, safe, adequate, sufficient, service or facilities to be observed, furnished, enforced, or employed including all such repairs, changes, alterations, extensions, substitutions, or improvements in facilities as shall be reasonably necessary and proper for the safety, accomodation, and convenience of the public, and shall fix the same by its order or regulation. 1137, May 28, P.L. 1053, art. IV, §413.

k. §1211. Mandatory systems of accounts

The commission may, after reasonable notice and hearing, establish systems of accounts (including cost finding procedures) to be kept by public utilities, or may classify public utilities and establish a system of accounts for each class, and prescribe the manner and form in which such accounts shall be kept. Every public utility shall establish such systems of accounting, and shall keep such accounts in the manner and form required by the commission. The accounting system of any public utility also subject to the jurisdiction of a Federal

regulatory body shall correspond, as far as practicable, to the system prescribed by such Federal regulatory body: Provided, That the commission may require any such public utility to keep and maintain supplemental or additional accounts to those required by any such regulatory body. 1937, May 28, P.L. 1053, art. V, §501.

l. §1241. Registration of securities to be issued or assumed

(a) Under such regulations as the commission may prescribe, every public utility, before it shall execute, cause to be authenticated, deliver, or make any change or extension in any term, condition, or date of, any stock certificate or other evidence of equitable interest in itself, or any bond, note, trust certificate, or other evidence of indebtedness of itself, any or all of which acts are hereinafter included in the term "issuance of securities", shall have filed with the commission, and shall have received from the commission, notice of registration of a document to be known as a securities certificate: Provided, That neither (1) the execution, authentication, or delivery of securities to replace identical securities lost, mutilated, or destroyed while in the ownership of a bona fide holder-for-value, who properly indemnifies the public utility, therefor, nor (2) the execution, authentication, or delivery of securities in exchange for the surrender of identical securities, solely for the purpose of registering or facilitating changes in the ownership thereof between bona fide holders-for-value, which surrendered securities are thereupon cancelled, nor (3) the delivery from the treasury of the public utility of securities previously reacquired from bona fide holders-for-value and held alive, shall be deemed an issuance of securities under this subsection: And provided further, That the requirements of this paragraph shall not apply to the issuance of - (1) any evidence of indebtedness, the date of maturity, or which is at a period of less than one year from the date of its execution, (2) any evidence of indebtedness for which no date of maturity is fixed, but which matures upon demand of the holder, (3) any evidence of indebtedness in the nature of a contract between a public utility and a vendor of equipment wherein the public utility promises to pay installments upon the purchase price of equipment acquired, and which is not in the form of an equipment trust certificate or similar instrument readily marketable to the general public.

(b) Under such regulations as the commission may prescribe, every public utility, before it shall assume primary or contingent liability for the payment of any dividends upon any stocks, or of any principal or interest of any indebtedness, created or incurred by any other person or corporation, any or all of which acts are hereinafter included in the term "assumption of securities", shall have filed with the commission, and shall have received from the commission notice of registration of a document to be known as a Securities Certificate: Provided, however, That the requirements of this paragraph shall not apply to an assumption of securities if the commission shall have approved the acquisition of all of the property of the issuing company by the assuming company, as provided in paragraph (e) of section two hundred two of this act. 1937, May 28, P.L. 1053, art. VI, §601; 1938, Sp. Sess., Sept. 28, P.L. 44, §1.

m. §1271. Contracts for services

(a) Within thirty days after the effective date of this act, every public utility having in force any contract with an affiliated interest for the furnishing to such public utility of any management, supervisory, purchasing, construction, engineering, financing, or other services, shall file a copy of such contract, or if oral, a complete statement of the terms and conditions thereof, with the commission.

(b) Every public utility which shall hereafter enter into any such contract, or which shall change any such existing contract, shall file a copy of such contract with the commission within ten days after its execution or change.

(c) The commission shall have authority at any time to investigate every such contract filed in accordance with this section, and, if after reasonable notice and

hearing, it shall determine that the amounts paid or payable thereunder are in excess of the reasonable cost of furnishing the services provided for in the contract, or that such services are not reasonably necessary and proper, it shall order such amounts, in so far as found excessive, to be stricken from the books of account of the public utility as charges to fixed capital, or operating expenses, as the case may be, and shall not consider such amounts in any proceeding. In any proceeding involving such amounts, the burden of proof to show that such amounts are not in excess of the reasonable cost of furnishing such service, and that such services are reasonable and proper, shall be on the public utility. 1937, May 28, P.L. 1053, art. VII, §701.

n. §1341. Administrative authority of commission; regulations

The commission shall have general administrative power and authority to supervise and regulate all public utilities doing business within this Commonwealth. The commission may make such regulations, not inconsistant with the law, as may be necessary or proper in the exercise of its powers or for the performance of its duties under this act. 1937, May 28, P.L. 1053, art. IX, §901.

o. §1342. Commission to enforce act

In addition to any powers hereinbefore expressly enumerated in this act, the commission shall have full power and authority, and it shall be its duty, to enforce, execute, and carry out, by its regulations, orders, or otherwise, all and singular the provisions of this act, and the full intent thereof; and shall have the power to rescind or modify any such regulations or orders. The express enumeration of the powers of the commission in this act shall not exclude any power which the commission would otherwise have under any of the provisions of this act. 1937, May 28, P.L. 1053, art. IX, §902.

p. §1343. Enforcement proceedings by commission

Whenever the commission shall be of opinion that any person or corporation including a municipal corporation, is violating, or is about to violate, any provisions of this act; or has done, or is about to do, any act, matter, or thing herein prohibited or declared to be unlawful; or has failed, omitted, neglected, or refused, or is about to fail, omit, neglect, or refuse, to perform any duty enjoined upon it by this act; or has failed, omitted, neglected or refused or is about to fail, omit, neglect, or refuse to obey any lawful requirement, regulation, or order made by the commission; or any final judgment, order, or decree made by any court, then and in every case the commission may institute in the court of common pleas of Dauphin County, injunction, mandamus, or other appropriate legal proceedings, to restrain such violations of the provisions of this act, or of the regulations, or orders of the commission, and to enforce obedience thereto; and such court of common pleas is hereby clothed with exclusive jurisdiction throughout the Commonwealth to hear and determine all such actions. No injunction bond shall be required to be filed by the commission. Such persons, corporations, or municipal corporations as the court may deem necessary or proper to be joined as parties, in order to make its judgment, order or writ effective, may be joined as parties. The final judgment in any such action or proceeding shall either dismiss the action or proceeding, or direct that the writ of mandamus or injunction issue or be made permanent as prayed for in the petition, or in such modified or other form as will afford appropriate relief. 1937, May 28, P.L. 1053, art. IX, §903, as amended, 1971, June 3, P.L. -, No. 6, §1 (§509 (a)(115)).

q. §1360. Contracts; power of the commission to vary, reform or revise

The commission shall have power and authority to vary, reform, or revise, upon a fair, reasonable, and equitable basis, any obligations, terms, or conditions of

any contract heretofore or hereafter entered into between any public utility and any person, corporation, or municipal corporation which embrace or concern a public right, benefit, privilege, duty, or franchise, or the grant thereof, or are otherwise affected or concerned with the public interest and the general well being of the Commonwealth.

Whenever the commission shall determine, after reasonable notice and hearing, upon its own motion or upon complaint, that any such obligations, terms, or conditions are unjust, unreasonable, inequitable, or otherwise contrary or adverse to the public interest and the general well being of the Commonwealth, the commission shall determine and prescribe by findings and order, the just, reasonable, and equitable obligations, terms and conditions of such contract. Such contract, as modified by the order of the commission, shall become effective thirty days after the service of such order upon the parties to such contract. 1937, May 28, P.L. 1053, art. IX, §920.

2. Pa. P.U.C. - Tariff Regulations

a) Section II. PUBLIC NOTICE OF TARIFF CHANGES

1. Unless the Commission otherwise orders, no public utility to which these rules apply shall make any change in any existing and duly established tariff except after sixty (60) days' notice to the public.

2. Each such notice shall plainly state the changes proposed in the tariff then in force, and the date on which the changes will become effective. (See Section III).

b) Section VIII. DISCOUNT FOR PROMPT PAYMENT AND PENALTIES FOR DELAYED PAYMENT OF BILLS

Every public utility that imposes penalties upon its customers for failure to pay bills promptly, or allows its customers discounts for prompt payment of bills, shall provide in its posted and filed tariffs a rule setting forth clearly the exact circumstances and conditions in which the penalties are imposed or discounts are allowed. The tariff shall also indicate clearly whether, if bills are paid by mail, the date of the postmark will be considered the date of payment.

3. Pa. P.U.C. - Electric Regulations

Rule 14 - ADJUSTMENT OF BILLS FOR AVERAGE METER ERROR

A. AVERAGE METER ERROR - In meter tests made by the public utility or by the Commission at the request of a customer (Rule 12), the correctness of adjustment of the meter and its performance in service shall be judged by its average error, determined as follows:

(1) If the meter is used to measure a load which is substantially constant the meter shall be tested at such load. The error of the meter at such constant load shall be accepted as the average meter error.

(2) If the meter is used to measure a variable load, the average error shall be obtained by taking one-fifth of the algebraic sum of

(a) One part of the error at light load plus
(b) four parts of the error at heavy load

(3) If, in the opinion of the Commission, another load is more representative of the average operating load, the error of the meter at such average operating load shall be accepted as the average meter error.

B. FAST METERS - If, upon test of any meter is found to have an average meter error of more than two (2%) per cent fast, the public utility shall refund to the customer the overcharge, based upon the corrected meter reading for a period equal to one-half the time elapsed since the last previous test, but not to exceed three (3) months. If the period of registration error can be definitely fixed, the overcharge shall be computed for such period. If the meter has not been tested in accordance with Rule 10, the period for which it has been in service beyond the regular test period shall be added to the three (3) months in computing the refund.

C. SLOW METERS - If, upon test of any meter, the meter is found to have an average meter error of more than two (2%) per cent slow, the public utility may render a bill for the service furnished, but not covered by bills previously rendered, for a period equal to one-half the time elapsed since the past previous test, but not to exceed three (3) months. If the period of registration error can be definitely fixed, the charge may be computed for such period.

D. ACCESS TO METERS - The public utility shall at all reasonable times have access to meters, service lines and other property owned by it on customer's premises, for purposes of maintenance and operation. Neglect or refusal on the part of customers to provide reasonable access to their premises for the above purposes shall be deemed to be sufficient cause for discontinuance of service.

4. Metropolitan Edison Company Electric Tariff
Electric Pa. P.U.C. No. 41

Cause for discontinuance of service:

Company reserves the right to discontinue its service on reasonable notice and to remove its equipment in case of non payment of bill or violation of the Pennsylvania Public Utility Commission's or Company's Rules and Regulations, or, without notice, for abuse, fraud, or tampering with the connections, meters or other equipment of Company. Failure by Company to exercise this right shall not be deemed a waiver thereof.

Should the Company's service be terminated for any cause aforesaid, the minimum charge for the unexpired portion of the term shall become due and payable immediately, provided, however, that if satisfactory arrangements are subsequently made by Customer for reconnection of the service (in which event, a reconnection charge of not less than $1.00 must be paid) the immediate payment of the minimum charge for the unexpired portion of the contract term may be waived or modified as the circumstances indicate would be just and reasonable.

Company may refuse its service to, or remove its service from, any installation which, in the judgment of Company, will injuriously affect the operation of Company's system or its service to other Customers.
Issued April 30, 1971. Effective June 30, 1971.

5. Kansas Statutes Annotated

K.S.A. §66-101

"Power, authority and jurisdiction. The state corporation commission is given full power, authority and jurisdiction to supervise and control the public utilities, including radio, common carriers, and all common carriers, as hereinafter defined, doing business in the state of Kansas, and is empowered to do all things necessary and convenient for the exercise of such power, authority and jurisdiction."

Supreme Court, U. S.
FILED
APR 3 1974
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-5345

CATHERINE JACKSON, On Behalf of Herself and All Others Similarly Situated,

Petitioner,

vs.

METROPOLITAN EDISON COMPANY, a Pennsylvania Corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 3, 1973
CERTIORARI GRANTED FEBRUARY 19, 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-5845

CATHERINE JACKSON, On Behalf of Herself and All Others Similarly Situated,

Petitioner,

vs.

METROPOLITAN EDISON COMPANY, a Pennsylvania Corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Relevant Docket Entries

A. DISTRICT COURT:

Civil No. 71-453

Catherine Jackson, On Behalf of Herself and All Others Similarly Situated, Plaintiff

vs.

Metropolitan Edison Company, a Pennsylvania Corporation, Defendant

PETITION—of Plaintiff, by counsel, for leave to proceed in forma pauperis, and

AFFIDAVIT—thereto, and

ORDER—of Court; Leave is granted to Plaintiff Catherine Jackson to file the Complaint and to proceed thereafter in said case until final determination of said matter or until further order of Court, in forma pauperis without the necessity of payment of fees and costs in this proceeding.

COMPLAINT—

MOTION—for class action, and temporary restraining order.

ORDER—of Court; Defendant, its agents, servants and employees are hereby enjoined from summarily terminating and discontinuing Plaintiff's electrical services, without prior notice and hearing, and Defendant is further enjoined and directed to restore Plaintiff's electrical services, and it is further

Ordered that this order will expire within 5 days after entry unless within such time the order for good cause is extended, or unless the Defendant consents that it may be extended for a longer period; and it is further

Ordered that the Plaintiff's motion for a preliminary injunction be set down for a hearing on the 22nd day of October 1971, at 10:00 A.M. at U.S. Courthouse, Scranton, Pennsylvania and it is further

Ordered that copies of this order and of Plaintiff's complaint submitted therewith be immediately served upon the Defendant.

AFFIDAVIT—of service

PRELIMINARY STATEMENT—of plaintiff.

MINUTE SHEET—re hearing on motion for preliminary injunction. Defendant to file motion to dismiss and brief thereon within 3 weeks. Plaintiff may file reply brief. In the meantime, further hearing on motion for a preliminary injunction is continued. (N)

MOTION—of Defendant to dismiss, and

NOTICE—motion will be presented to the Court at such time as the Court directs; attached thereto.

MOTION—of the Commonwealth of Pennsylvania, Applicant for Intervention for leave to intervene as a Plaintiff in this action.

DEFENDANT'S MOTION—in opposition to Commonwealth's motion to intervene, and

ORDER—. . . On November 24, 1971, the Commonwealth of Pennsylvania submitted a motion to intervene in which it was averred that since the outcome of this case would substantially affect all Pennsylvania electricity consumers and that since the Attorney General was the chief legal counsel for the citizens of Pennsylvania, only his intervention could insure adequate representation in this case. However, Commonwealth neglected to attach to its motion the pleading required by

Rule 24, Fe.R.Civ.P. setting forth the claim or defense for which intervention was sought.

. . .

The court has personally contacted the Attorney General's office on several occasions on the matter, only to be told the motion would be submitted without any further delay.

. . .

The Commonwealth is hereby allowed 10 days in which to submit a proper application of intervention or its prior motion will be stricken.

Copy to counsel of record.

MEMORANDUM AND ORDER—Now, this 30th day of June, 1972, in accordance with memorandum filed this day, defendants motion is granted and plaintiff's claim is dismissed. (n) Copies mailed to Counsel of record.

MOTION—of Plaintiff for Stay or Order and Continuance of Temporary Restraining Order and

NOTICE—of Motion, and

CERTIFICATE—of service thereof

NOTICE OF APPEAL—of Plaintiff from Order and Memo of June 30, 1972

Copy U.S. Court of Appeals, counsel of record

MEMORANDUM—in Opposition to Plaintiff's Motion for Stay of Order and Continuance of Temporary Restraining Order, and

AFFIDAVIT—of Ernest W. Schleicher, V.P. of Metropolitan Edison Co.

ORDER—Upon consideration of the motion of plaintiff to restore during the pendency of the Appeal in the case

the Temporary Restraining Order issued by this court against the defendant on October 18, 1971, and subsequently extended by agreement of the parties, and

It appearing to the Court that the status quo should be preserved until the disposition of Plaintiff's Appeal by the Court of Appeals for the Third Circuit.

It is Ordered that the Temporary Restraining Order issued on October 18, 1971 and extended by agreement is restored pending determination of plaintiff's Appeal and defendant is enjoined from summarily terminating and discontinuing plaintiff's electrical services, without a prior notice and hearing. Plaintiff is not required to file a Bond. (N)

LETTER—from U.S. Court of Appeals. Appeal docketed to No. 72-1745.

B. COURT OF APPEALS:

Case No. 72-1745

Catherine Jackson, On Behalf of Herself and All Others Similarly Situated, Plaintiff

vs.

Metropolitan Edison Company, a Pennsylvania Corporation, Defendant

Forma Pauperis granted in D.C.—see copy of D.C. order dated October 18, 1971 by Nealon, J. granting appellant leave to proceed in forma pauperis, etc.

Copy of Notice of Appeal, rec'd July 17, 1972 filed.

Record rec'd August 9, 1972, filed.

Motion by appellant for hearing of appeal on original record without necessity of reproducing parts thereof, filed. (3 cc). Certificate of service attached.

Submitted on above motion by appellant. Clerk.

Appearance of Edward J. Dailey, Esq. for Amicus Curiae (National Consumer Law Center, Inc.), filed.

Order (*Clerk*) granting appellant's motion for hearing of appeal on original record without necessity of reproducing parts thereof, provided that there is filed with the brief for appellant, four copies of the opinion, and order from which this appeal is taken, filed.

Order (Staley, *Van Dusen* and Rosenn) granting motion by National Consumer Law Center, Inc. for leave to file brief Amicus Curiae, filed

Brief for Commonwealth of Pennsylvania as amicus curiae, rec'd October 3, 1973, filed. (24 add'l rec'd October 5, 1972)

Motion by Fellowship Commissions Committee on Consumer and Citizen Complaints as amicus curiae for leave to file its brief out of time (also treated as a motion to file an amicus brief, as well as out of time), filed.

Argued. Coram: Hunter and Weis, C.J. and Scalera, D.J.

Opinion of the Court (Hunter * and *Weis*, Circuit Judges and Scalera, District Judge), filed.

Judgment affirming the judgment of the D.C. filed June 30, 1972, with costs taxed against appellant, filed. * Judge Hunter was present at the argument of this case but did not participate in the decision.

Certified judgment in lieu of formal mandate issued.

Motion by appellant for leave to file petition for rehearing nunc pro tunc, filed. (4 copies) service attached.

Letter dated September 17, 1973 from Paul A. Barrett, Esquire for the information of the court.

RELEVANT DOCKET ENTRIES

Order (*Weis*, Circuit Judge and Scalera, District Judge) granting appellant's motion to file petition for rehearing nunc pro tunc, filed.

Petition for Rehearing for appellant, filed. (rec'd 9/13/73) (10 copies) and Memorandum in Support of petition for rehearing en banc, rec'd for information of the Court.

Petition of Amicus Curiae for rehearing en banc, rec'd for information of the Court

Supplement to amicus curiae petition for rehearing before the Court en banc, rec'd for the information of the Court.

Order (Seitz, Van Dusen, Aldisert, Adams, Gibbons, Rosenn, *Weis* and Garth, C.J. and Scalera, D.J.) denying the petition for rehearing, filed.

Record returned to Clerk of D.C.

Receipt for record, filed.

Notice of filing (on December 3, 1973 of petition for writ of certiorari rec'd from Clerk of Supreme Court, filed. (S.C. No. 73-5845).

Certified copy of order dated February 19, 1974 rec'd from Clerk of Supreme Court granting the motion to proceed in forma pauperis and granting the petition for writ of certiorari, filed. (S.C. No. 73-5845).

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 71-453

CATHERINE JACKSON, On Behalf of Herself
and All Others Similarly Situated,
PLAINTIFF

—*vs.*—

METROPOLITAN EDISON COMPANY,
a Pennsylvania Corporation,
DEFENDANT

COMPLAINT

And Now, comes Plaintiff, Catherine Jackson, by her Attorneys, Alan Linder, Esquire and Albert G. Barnes, Jr., Esquire, in the above captioned matter, and respectfully represents:

JURISDICTION

1. Jurisdiction of this Court is invoked pursuant to Title 28 USC Sections 1331 and 1343 (3) and (4). The amount in controversy exceeds the sum of $10,000.00, exclusive of costs and interest. This is an equitable suit authorized by 42 USC Sections 1983 and 1988, to redress deprivation under color of law of rights, privileges and immunities, secured by the Constitution of the United States.

PARTIES

2. Plaintiff, Catherine Jackson, is an adult individual, age 28, who presently resides at 531 Cleveland Avenue, York, York County, Pennsylvania.

3. Defendant, Metropolitan Edison, is a Pennsylvania Corporation, duly incorporated under the laws of Pennsylvania with registered office at Reading, Berks County, Pennsylvania, and with offices and place of business at Parkway Blvd., York, York County, Pennsylvania, and

is licensed to do business within the Commonwealth of Pennsylvania.

4. Defendant corporation is a public utility as defined by the Public Utility Law, Act of May 28, 1937, P.L. 1053, 66 P.S. Section 1102, is in the business of providing its customers with electrical service within the City and County of York, Pennsylvania, and is subject to the rules and regulations of the Pennsylvania Public Utility Commission and the Commonwealth of Pennsylvania.

GROUP ALLEGATION

5. Plaintiff brings this action on her own behalf and on behalf of all other persons similarly situated, pursuant to Rule 23A and B (2) of the Federal Rules of Civil Procedure. Said class of persons consists of all low income customers of Defendant whose electrical service has been or will be terminated by Defendant for alleged non-payment of bills for service furnished. There are common questions of fact and law regarding Defendant's unlawful termination of Plaintiff's electrical service, and of the resulting denial of due process of law to Plaintiff and to said class, without prior notice and hearing to determine liability for payment of outstanding bills. The members of this class are so numerous as to make it impracticable to bring them all before this Court. A common relief is sought. The Plaintiff adequately represents the interest of the class.

STATE ACTION

6. Defendant corporation is regulated by the Pennsylvania Public Utility Commission and is subject to the laws of the Commonwealth of Pennsylvania, and has a monopoly in the providing of electrical services within York, Pennsylvania and therefore state action has been applied through Defendant, in this case under the facts set forth, to the prejudice of Plaintiff and the class she represents.

RELIEF SOUGHT

7. This is a proceeding for:

a. Temporary restraining order, preliminary and permanent injunction requiring Defendant to restore Plaintiff's electrical service, and to prevent Defendant from terminating electrical service in the future for alleged non-payment of utility bills, prior to adequate notice and hearing concerning the alleged liability for payment thereof.

b. Declaratory judgement that Defendant's summary termination of Plaintiff's electrical services for alleged non-payment of utility bills, without notice and hearing, is unconstitutional.

FACTS OF THIS CASE

8. Defendant provided electrical service to Plaintiff at Plaintiff's address at 531 Cleveland Avenue, York, York County, Pennsylvania, and on October 11, 1971 terminated said utility service for Plaintiff's alleged non-payment of the utility bill in the approximate amount of ONE HUNDRED TEN DOLLARS ($110.00).

9. The billing party or person responsible for said bill, since on or about October, 1970, has been and is one James Dodson, a former co-occupant with Plaintiff, of the above premises.

10. Plaintiff has offered Defendant partial payments on account of said bill, but that Defendant has refused said tender, and in fact demands payment in full, prior to restoration of said utility service.

11. Plaintiff is presently without electrical service, is without the means to make payment in full, lacks the means to make payment in full, lacks the means to move from said premises, and is unable to secure substitute electrical service.

12. Plaintiff occupies the above premises with her two minor children, ages 10 and 12 respectively, and her sole source of income is a Public Assistance grant in the amount of ONE HUNDRED NINETEEN DOLLARS ($119.00) received every two weeks.

13. As a result of termination of electrical services, Plaintiff has incurred property damage, and has herself and her children suffered physical harm and mental anguish.

14. Plaintiff and her children will suffer irreperable harm unless said electrical service is restored, and accordingly, injunctive relief is necessary.

15. There does not exist an adequate remedy at law, and further that due to the crucial issue involved, there is no time in which to attempt to exhaust administrative remedy procedure by filing of a formal complaint with the Pennsylvania Public Utility Commission, the regulatory commission of Defendant.

16. Plaintiff has an adequate defense to her alleged liability of the utility bill.

17. Nowhere in the rules, regulations or statutes governing Defendant's operations are there provisions which establish any procedure affording Plaintiff and other class members a hearing to determine liability for utility bills or the validity of Defendant's reasons for discontinuance of services, prior to the termination of said services.

DENIAL OF RIGHTS

18. Defendant's termination of Plaintiff's electrical service without prior notice and hearing is unconstitutional and unlawful, in that:

a. Such action is a denial of Plaintiff's due process rights under the 14th Amendment of the U.S. Constitution, in that Plaintiff is afforded no notice or opportunity to be heard.

b. Such action is a denial of Plaintiff's rights under the Equal Protection Clause of the 14th Amendment of the U.S. Constitution, in that no remedy is provided them to contest such discontinuance of services by Defendant solely by reason of their poverty and in absence of any compelling state interest or other reasonable basis for such denial.

c. Such action deprives Plaintiff of a vital necessity of life, and hence deprives Plaintiff of the right to life

and property under the Ninth Amendment of the U.S. Constitution.

WHEREFORE, Plaintiff, on behalf of herself and on behalf of all other persons similarly situated, respectfully requests that this Court:

A. Take jurisdiction in this case.

B. Issue a temporary restraining order enjoining Defendant to forthwith restore Plaintiff's electrical service.

C. After hearing, issue a preliminary and permanent injunction enjoining Defendant from terminating electrical service of Plaintiff and the members of her class for alleged non-payment of utility bills, without prior notice and hearing on liability for payment of said bill.

D. Declare Defendant's summary termination of utility service unconstitutional, while acting under color of state law, in violation of rights afforded Plaintiff and the members of her class under the Due Process and Equal Protection Clauses of the 14th Amendment of the U.S. Constitution.

E. Award such damages as shall have been caused to Plaintiff and class members as the Court shall determine suffered because of Defendant's conduct.

F. Award such other relief as the Court may deem just and equitable in this matter.

Respectfully submitted,

/s/ Alan Linder
ALAN LINDER, Esquire

Dated: Oct. 18, 1971

/s/ Albert G. Barnes, Jr.
ALBERT G. BARNES, JR., Esquire
Attorneys for Plaintiff
Tri-County Legal Services
220 East King Street
York, Pennsylvania 17403
(717) 843-8938

COMMONWEALTH OF PENNSYIVANIA)
) ss:
COUNTY OF YORK)

Before me, the subscriber, a Notary Public in and for the said County and Commonwealth, appeared Catherine Jackson, who, being duly sworn according to law, deposes and says that the facts set forth in the foregoing Complaint are true and correct to the best of her knowledge, information and belief.

/s/ Catherine Jackson
CATHERINE JACKSON

Sworn and subscribed to before me this 18th day of October, 1971.

/s/ Valerie G. Berta
VALERIE G. BERTA
Notary Public, York, York County
My Commission Expires January 20, 1975

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 71-453

CATHERINE JACKSON, On Behalf of Herself and All Others Similarly Situated,
PLAINTIFF

—*vs*—

METROPOLITAN EDISON COMPANY, a Pennsylvania Corporation,
DEFENDANT

TEMPORARY RESTRAINING ORDER

ORDER

AND NOW, TO WIT: this 18 day of Oct., 1971, upon motion of Alan Linder and Albert G. Barnes, Jr., Esquires, Attorneys for the Plaintiff above named:

This cause came to be heard on Plaintiff's complaint, and it appears that the Defendant is committing acts as set forth in Plaintiff's complaint and will continue to do so unless directed otherwise by order of this Court and that immediate and irreperable injury, loss, or damage will result to Plaintiff before notice can be given, and the Defendant and its attorney and interested opposing parties can be heard in opposition to the granting of a Temporary Restraining Order in that Plaintiff must immediately have restored her electrical services, which Defendant summarily discontinued without notice and hearing, it is

Ordered that Defendant, its agents, servants and employees are hereby enjoined from summarily terminating and discontinuing Plaintiff's electrical services, without prior notice and hearing, and Defendant is further enjoined and directed to restore Plaintiff's electrical services, and it is further

Ordered that this order will expire within 5 days after entry unless within such time the order for good cause is extended, or unless the Defendant consents that it may be extended for a longer period; and it is further

Ordered that the Plaintiff's motion for a preliminary injunction be set down for a hearing on the 22 day of Oct., 1971, at 10:00 A.M. o'clock at U.S. Court House, Post Office Bldg., Scranton, Pa., and it is further

Ordered that copies of this order and of Plaintiff's complaint submitted therewith, be immediately served upon the Defendant.

Issued at Scranton, Oct. 18, 1971.

BY THE COURT:

/s/ William J. Nealon
U. S. District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 71-453

CATHERINE JACKSON, On Behalf of Herself and All Others Similarly Situated,
PLAINTIFF

—*vs*—

METROPOLITAN EDISON COMPANY, a Pennsylvania Corporation,
DEFENDANT

AFFIDAVIT

Mr. Samuel B. Russell, Esq., Colonial Trust Building, Reading, Berks County, Pennsylvania 19601, phone #(215) 374-4895, Attorney for Defendant, was notified by Plaintiff's Attorney on October 18, 1971, at 10:00 A.M. that hearing argument regarding issuing of temporary restraining order would be held in the afternoon on October 18, 1971, before U.S. District Judge William Nealon, U.S. District Court, Scranton, Pennsylvania and informed Plaintiff's counsel by telephone that he would be unable to appear before the Court on said date.

/s/ Alan Linder
ALAN LINDER, Esquire
Attorney for Plaintiff

Sworn and subscribed to before me this ..... day of ....., 1971.

Notary Public

My Commission Expires:

October 20, 1972

Alan Linder, Esq.
Tri-County Legal Services
220 East King Street
York, Pa. 17413

To

EMILY R. CADDEN
Official Court Reporter
P. O. Box 63
Scranton, Pa. 18501

In re: Jackson v. Metropolitan Edison Co., USDC MD PA
Civil No. 71-453

To Transcript of Hearing before Judge William J. Nealon at Scranton, Pa., on Friday, October 22, 1971:

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 71-453

CATHERINE JACKSON, On Behalf of Herself
and All Others Similarly Situated

v.

METROPOLITAN EDISON COMPANY,
a Pennsylvania Corporation

Transcript of Hearing held before HONORABLE WILLIAM J. NEALON, United States District Judge, sitting at Scranton, Pennsylvania, on Friday, October 22, 1971, commencing at 11:40 o'clock, A.M.

APPEARANCES:

For the Plaintiff:

ALAN LINDER, ESQ.
Tri-County Legal Services
220 East King Street
York, Pennsylvania 17413

For the Defendant:

RUSSELL J. O'MALLEY, ESQ.
Miller Building
Scranton, Pa. 18503
and
RYAN, RUSSELL & McCONAGLEY
Colonial Trust Building
Reading, Pennsylvania 19601
By: SAMUEL B. RUSSELL, ESQ.

Reported by:

EMILY R. CADDEN
Official Court Reporter
Scranton, Penna. 18501

INDEX TO WITNESSES

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Exhibit No. 5,	5	6	6
Exhibit No. 6,	5	6	6
Exhibit No. 7,	6	6	6

[3] (Court opens at 11:40 A.M.—Litigants and all counsel present.)

THE COURT: Gentlemen?

MR. O'MALLEY: If the Court please, for the purposes of this case I would like to move the admission of Mr. Samuel B. Russell, who is admitted to practice in the District Court of the United States for the Eastern District of Pennsylvania, and also the Supreme Court of Pennsylvania.

THE COURT: So ordered. Glad to have you, Mr. Russell.

MR. RUSSELL: Thank you, Your Honor.

THE COURT: Gentlemen?

MR. RUSSELL: If the Court please, the parties are prepared to stipulate certain documentary evidence, and if the Court has no objection, we would propose to have the evidence consecutively as exhibits without identification as to which party has submitted them.

THE COURT: All right. Suppose we make them Court Exhibits.

MR. RUSSELL: All right. As Court Exhibit No. 1, we have a certified copy of a deed dated March 21, 1969, from a Dorothy B. Marshall to Catherine M. Jackson, who is the plaintiff in this case.

MR. LINDER: That's correct.

(Court Exhibit No. 1 marked for identification.)

[4] MR. RUSSELL: As Court Exhibit No. 2, we have a certified copy of a mortgage given by Catherine M. Jackson, the plaintiff in this proceedings, to National Bank and Trust Company of Central Pennsylvania with respect to the premises which is the subject of Court Exhibit No. 1.

THE COURT: What is the date of that?

MR. RUSSELL: I'm sorry. The date is—

THE COURT: March 21, 1969?

MR. RUSSELL: (Continuing)—March 21, 1969.

(Court Exhibit No. 2 marked for identification.)

MR. RUSSELL: As Court Exhibit No. 3, we have a photograph showing the premises which are in part the

subject of the deed, which is Court Exhibit No. 1. The particular residence in question is the property shown in the right center bottom of this photograph and to the left of a tree appearing at the right of the photograph, and the house in question is marked with an "X".

(Court Exhibit No. 3 marked for identification.)

MR. RUSSELL: As Court Exhibit No. 4, we have a photograph of a portion of the wall of the right side of the premises, which is the subject of Court Exhibit No. 1, as those premises appear on Court Exhibit No. 3. On this exhibit appears the electrical wiring bringing service to the subject premises, an electric meter affixed to the wall and other wires leading into the subject premises.

(Court Exhibit No. 4 marked for identification.)

[5] MR. RUSSELL: As Court Exhibit No. 5, we have a further photograph showing a portion of the same wall appearing in Court Exhibit No. 4. It is in effect a close-up of the meter area shown in Court Exhibit No. 4.

(Court Exhibit No. 5 marked for identification.)

MR. RUSSELL: Now, I state to the Court that the parties stipulate that so far as Court Exhibits 3, 4 and 5 are concerned, they accurately portray the condition of the subject premises of the plaintiff as of October 11, 1971, and it is further stipulated with respect to those same three exhibits that the meter—I'm sorry—with respect to the latter two of those exhibits, Court Exhibits 4 and 5, that the meter shown in such photographs was not the meter that was in place at this location at the time service, electric service, to the subject premises was disconnected by defendant in September of 1970. It was a new meter.

MR. LINDER: Right.

MR. RUSSELL: If the Court wishes, we can bring specifically to the attention—Oh, I'm sorry. Strike that.

As Court Exhibit No. 6, we offer various sheets and supplements constituting Defendant's Tariff No. 40, Electric Tariff No. 40, showing the provisions of such tariff

as they were in effect during the period of January 1, 1970, to and including June 29, 1971.

(Court Exhibit No. 6 marked for identification.)

[6] MR. RUSSELL: As Court Exhibit No. 7, we have Defendant's Electric Tariff No. 41, showing the provisions of such tariff as they have been in effect on and since June 30, 1971.

THE COURT: That's from June 30, '71, to date?

MR. RUSSELL: Yes.

(Court Exhibit No. 7 marked for identification.)

MR. RUSSELL: Now, if the Court wishes, we could bring specifically to the attention of the Court several provisions in Court Exhibits 6 and 7, which bear on the issues raised in this proceeding. We direct the Court's attention to the general rules and regulations appearing in the front of these last two Court Exhibits 6 and 7, specifically Rule 15 having to do with causes for disconnection of service.

THE COURT: Rule 15?

MR. RUSSELL: Right. Rule 28 having to do with beginning and ending of service, and Rule 14 having to do with tampering with company equipment, and Rule 12 having to do with responsibility for damages to customers or company's equipment. I believe that covers the area of stipulation.

THE COURT: So agreed and Court Exhibits 1 through 7, inclusive, are received into evidence.

Mr. Linder?

MR. LINDER: Your Honor, does the Court wish [7] an opening statement on plaintiff's behalf or do you prefer—

THE COURT: You may waive it if you desire. Whatever you want to do. It's up to you.

MR. LINDER: Your Honor, I would like to make an opening statement to the effect that the Court is aware this is a hearing for preliminary injunction to sustain the temporary restraining order which was issued in this case on October 18th. In that regard, I would like to—through our witnesses we would like to acquaint

the Court with the background of the case by termination of plaintiff's electrical service by defendant, and it is our contention that it's an unlawful termination of service, and we would like to put the plaintiff on—the name plaintiff on the stand with regard to the facts surrounding the discontinuance of service.

THE COURT: Surely.

MR. LINDER: Thank you.

CATHERINE M. JACKSON,

Plaintiff, called and sworn in her own behalf, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LINDER:

Q Mrs. Jackson, where do you reside, please?
A Beg your pardon?
Q Where do you live?
A 531 Cleveland Avenue, York.
[8] Q Are you the plaintiff in this case?
A Yes.
Q How long have you lived at 531 Cleveland Avenue?
A About two and a half years.
Q Do you own the home?
A Yes.
Q And there is a mortgage on the home?
A Yes.
Q Now, has electrical service been provided to your home by Metropolitan Edison Company?
A Yes, it has.
Q How long has that service been in effect?
A What do you mean how long it's been in effect?
Q How long have you had electricity furnished by Metropolitan Edison Company?
A Ever since I've been in there.
Q And that would be since March of '69?
A Yes.
Q Who occupies that house with you? Who lives in that house?

A Now?
Q And since you moved in.
A When I moved in there was James Dodson that was living in there, and—

THE COURT: Was he living there before you moved in?

[9] THE WITNESS: No.

THE COURT: He moved in with you, is that it?

THE WITNESS: Right. (Continuing)—and my two children.

BY MR. LINDER:

Q How old are the children?
A My son is twelve and my daughter is ten.
Q Does Mr. Dodson still live in that house?
A No, he does not.
Q When did he leave?
A August of this year.
Q August?
A Yes.
Q Would you tell us what happened in regard to your electricity service last year in September, 1970?
A In September of 1970, on September the 22nd, the electric was disconnected in my name. I went out to make a phone call to the Electric Company. When I got back, the electric was back on, so I didn't say anything and then—
Q Are you saying that the electricity was turned off on the 22nd of September and turned back on on the 22nd of September?
A Right.
Q Were the bills at that time—Whose name were the bills in at that time?
[10] A Before September, they were in my name. After September they started coming in James Dodson's name.
Q Do you have any explanation for that?
A No, I do not.

THE COURT: Now, you said they were turned back on the same day after you made a phone call?

THE WITNESS: Yes.

THE COURT: In other words, you had talked to someone at the Electric Company, is that it?

THE WITNESS: Yes, I did.

THE COURT: What was your conversation?

THE WITNESS: I asked them how come the thing was disconnected and they said because of non-payment of bill, but I had been out there and made a payment on the electric bill and told them I couldn't make another one until the first of the month, and the guy said, "Okay."

THE COURT: And you said you'd make a payment the first of the month?

THE WITNESS: Right.

THE COURT: All right. Go ahead.

BY MR. LINDER:

Q When the bills came, did the bills—Whose name did the bills then come in?

A After September?

Q After September.

[11] A They was coming in James Dodson's name.

Q And he was living there at that time?

A Yes, he was.

Q Do you know what he did with those bills?

A No, I do not.

Q Do you know whether the electric bills wer paid or not?

A No, I do not.

Q Did anyone ever inform you that they had not been paid?

A I wasn't informed of this until the Wednesday before Mr. Eberly came to the house.

Q When is this that you're referring to?

A It was a week ago. The week before last on Tuesday. Well, he came that Thursday and the one guy came on the Wednesday and asked for James Dodson and I said that he wasn't there; that he didn't live there any more, and then on Thursday, Mr. Eberly came out and was talking to me.

Q Was that the beginning of October of this year?

A It was the week before last.

Q Would it be on or about October the 6th?

A Somewhere around there, yes.

Q All right. Now, someone came out to your house?

A Yes.

Q From Metropolitan Edison?

[12] A Yes.

Q Do you know his name?

A No. He just rang the front door bell and asked for James Dodson, and I told him he didn't live there any more.

Q What day of the week was that?

A That was or a Tuesday.

Q All right. And then—

A Tuesday or Wednesday.

Q All right. What happened then?

A Then that Thursday Mr. Eberly came out.

Q From?

A From the Metropolitan Edison, the electric company, and he was out back looking at—Well, the dogs was in the yard and he couldn't get in, and he asked did they bite and I said no, so he went in and he was reading the meter. So he was asking me about the meter and I told him, and he told me that somebody crossed some kind of line, and I said I didn't know anything about that and I didn't mess with it, and he said that he would have to go back to the company and find out just what was going on and just what was what, and I said, "Okay," and he told me to have $30.00 by Monday.

Q This was on Thursday?

A Yes.

Q All right. Go ahead.

A And I told him okay, and he said he would be back [13] Monday morning to talk to me about it, and when Monday came he didn't show. At 9:00 o'clock Monday morning, I started out the door to call and find out just what was going on, and that's when the lines out there was disconnected, and the man, which one it was, came over and said, "We have notice to disconnect the electric," and I says, "Well, how much is the bill," and he said, "We don't know," and he shut the thing off. So I went and called the electric company for him and he was out until 6:30, and he left word with the office for me to call him at his home.

Q This is whom now?

A Mr. Donald Ebersly. So when I called his home, I asked him about the thing and he said that it's out of his hand, and Mr. Bentley has to connect it.

Q Did you talk to Mr. Bentley?
A No, I did not.
Q Did you ever receive notice from Metropolitan Edison that your electrical service was going to be terminated?
A No.
Q We're speaking with regard to the termination—When did that termination occur? Do you know the date?
A What date when?
Q When your service was shut off?
A It was shut off on the 11th, Monday, I think.
Q Did you ever receive notice that that service was going to be turned off?
[14] A No, I did not.
Q Were you ever told orally that it was going to be shut off?
A No.
Q You received no written notice?
A No.
Q You mentioned prior that someone had come out to read the meter. I'm interested in whether had anyone come out to read the meter since the last time your electrical service was terminated in 1970?
A They were out there every month reading the meter.
Q How often?
A What is it, once a month or every other month and reads the meter. There's always a guy in the yard out there reading the meter. When they came in to read the meter, I never stopped them from going and read the meter.
Q You've seen them come into your yard—
A Yes, I have.
Q (Continuing)—and read the meter?
A Yes.
Q This would be between September of '70 and October of this year?
A Yes, it was.
Q When was the first time—You said when Mr. Eberly or one of the gentlemen from Metropolitan Edi-

son came out to [15] your house and informed you that someone had, quote, "tampered or crossed the lines"?
A Yes.
Q Was that the first time you had ever been informed of that?
A Yes.
Q Did you have any knowledge that that occurred?
A No, I did not.
Q Did you have anything to do whatsoever with any crossing of the line?
A No, I did not.
Q Did anyone ever tell you at any time that they had tampered with the meter or crossed the lines?
A No.
Q Did Mr. Dodson ever tell you that he had not paid the electric bill?
A No, he didn't.
MR. LINDER: You may cross examine.
MR. RUSSELL: May I have just a second?

(Brief off-the-record interval.)

MR. LINDER: With the Court's permission, I have one further question.

BY MR. LINDER:

Q You stated that the service was turned off October 11th. How long was it off?
[16] A It was off until Tuesday of this week.
Q That will be approximately eight days?
A Yes.
Q How is your house heated?
A I had to use the oven to heat it because the oil I use has an electric switch to it and cuts on and off automatically, and I had to use the oven to heat with downstairs.
Q Was anyone affected by the lack of heat or by the termination of the service?
A My children got cold and I had to take both of them to the doctor.
Q Did you have any lighting in the house?
A I didn't have any lighting, no heat and no hot water.

MR. LINDER: Thank you.

CROSS EXAMINATION

BY MR RUSSELL:

Q Mrs. Jackson, you've indicated that one James Dodson moved into your house at the time you moved in and continued to reside there continuously until August of 1971. Is that correct?

A Yes.

Q What was his status? Did he have a lease of a portion of the premises?

A We used to go together.

[17] Q He was not a tenant in the property?

A Well, after we broke up, he was—I let him stay on there until I got tired of him and then I just told him he had to leave.

Q Did he at any time during the period of his residence in your home have any interest in the property at 531 Cleveland Avenue in York?

A What do you mean by interest?

Q Did you convey or transfer any interest in the property to him?

A What do you mean interest in the property?

Q He was not a tenant, and you didn't convey to him any interest in the real estate? He was no owner of the real estate or any part of it? Is that right?

A I don't understand what you're trying to say.

THE COURT: He wasn't a part owner?

BY MR. RUSSELL:

Q He was not a part owner of the property, was he?

A No.

Q And he was not a tenant?

A Not really.

Q And this is correct, is it not, that you have had the use of electric energy in your home from September 22nd, 1970, through until the morning of October 11th, 1971?

A Repeat your question?

[18] MR. RUSSELL: Will you repeat the question, please?

(Court Reporter reads last question.)

THE WITNESS: Yes.

BY MR. RUSSELL:

Q And was that electric energy which you so used from the wires of the Metropolitan Edison Company?

A Yes.

Q And during the period of September 22nd, 1970, through October 11th, 1971, did you pay any electric bills with respect to the electric energy so consumed in your home?

A No.

Q Mrs. Jackson, did you not state to one or more representatives of Metropolitan Edison Company that James Dodson rehooked up the electric service to your home after Metropolitan Edison Company disconnected that service at the meter on September 22nd, 1970?

A No, I did not.

Q Did you not state to Mr. Donald Eberly, a customers' representative of Metropolitan Edison Company, on October 7th, 1971, when he visited your home, as you have testified, that electric service to your house should be put in the name of a Robert Jackson?

A Yes, I did this.

Q You did say that to him?

[19] A Yes.

Q And who is Robert Jackson?

A My son.

Q Pardon?

A My son.

Q That's your twelve year old son?

A Yes.

Q Isn't it a fact, Mrs. Jackson, that you told Mr. Eberly—

THE COURT: Is it Eberly?

MR. RUSSELL: His name is Eberly. I think she uses a slightly different name, but—

THE COURT: E-b-e-r—

MR. RUSSELL: E-b-e-r-l-y.
THE COURT: All right.

BY MR. RUSSELL:

Q (Continuing)—to put electric service for your home in the name of one Robert Jackson in order to conceal from Metropolitan Edison Company the fact that you were one and the same Catherine Jackson whose electric service at this subject premises, your home, had been disconnected by that company on September 22nd, 1970?

A I didn't do it to conceal anything.

Q Will you tell the Court why you told Mr. Eberly to enter electric service at your home in the name of your twelve year old son?

[20] A I said to put it in his name to give me time to get the rest of the money to pay it when the old bill that I had owed. This is the only reason I did it, but I wasn't concealing anything.

Q Isn't it a fact, Mrs. Jackson, that on the morning of October 11th, 1971, when the Metropolitan Edison Company employee met you at your home and told you that he was about to disconnect the electric service at the pole that he told you that disconnection was being made because of non-payment of bills and tampering with the company's meter?

A No, he did not tell me this. What he said was that the electric was being disconnected at the pole for non-payment of bill. That was all he said.

MR. RUSSELL: If the Court please, that's all the cross examination that we would have for Mrs. Jackson at this time.

THE COURT: Mrs. Jackson, was Mr. Dodson employed when he lived with you?

THE WITNESS: Yes, he was working at AMF, American Machine and Foundry at York as a machinist.

THE COURT: And are you telling me that on September 22nd, 1970, when the electricity was disconnected that you went to use the phone somewhere, is that it, to inquire?

THE WITNESS: At my sister's house, yes.

[21] THE COURT: And by the time you got back the service had been reinstated?

THE WITNESS: Right.

THE COURT: And are you telling me that you assumed someone from the electric company came and reinstated the service?

THE WITNESS: Yes.

THE COURT: How long were you away from the house at that time?

THE WITNESS: About forty-five minutes, because my sister lived two blocks away from me.

THE COURT: Now, up until that time had the bills come in your name?

THE WITNESS: Up until that time, yes.

THE COURT: And how did they come after that?

THE WITNESS: They came in James Dodson's name.

THE COURT: How did that happen?

THE WITNESS: I don't know.

THE COURT: You had no idea? Did you have any discussion with Mr. Dodson about this?

THE WITNESS: Yes, I did. I asked him how come he received the electric bills in his name and he said he didn't know, and I didn't say anything else to him about it.

THE COURT: Were you assuming that he was paying them?

[22] THE WITNESS: I was assuming that he was, yes, then they came in his name.

THE COURT: But prior to that time you paid them, is that it?

THE WITNESS: Yes.

THE COURT: And then they were turned off—the electricity was disconnected and then reinstated and you never paid it again?

THE WITNESS: No.

THE COURT: And you assumed he was paying it?

THE WITNESS: Yes.

THE COURT: Yet he didn't tell you he was going to pay it or—

THE WITNESS: He didn't tell me he did and he didn't tell me he didn't.

THE COURT: Well, what made you assume that he was going to pay it? Didn't you have any discussion about this?

THE WITNESS: Well, at the time that the first bill came in the bill was in his name and I gave the bill to him, you know, and when I asked him why the things were coming in his name, he said he didn't know, and I said, "You better take the thing out there and pay it," and he said, "Yeah, I'll pay it," like that.

THE COURT: He told you he would pay it?

[23] THE WITNESS: Yes, he did.

THE COURT: All right. That's all I have.

RE-DIRECT EXAMINATION

BY MR. LINDER:

Q When Mr. Dodson lived there, did he help pay any other bills or expenses?

A Yes, he gave money to pay some of the bills. Yes, he did.

Q So he lived there and he helped take care of the maintenance?

A Yes.

Q The maintenance of the house, too?

A Yes.

MR. LINDER: Thank you.

MR. RUSSELL: I have one further question.

RE-CROSS EXAMINATION

BY MR. RUSSELL:

Q You said, Mrs. Jackson, that James Dodson moved out of your home in August of 1971?

A Yes.

Q Did you pay any bills for electric service between August of 1971 and October, 1971?

A No.

MR. RUSSELL: That's all at this time.

THE COURT: Did the bills continue to come in his name.

[24] THE WITNESS: There wasn't no bill that come in there between August and October. There wasn't an electric bill that came in at all.

THE COURT: All right. That's all I have.

MR. LINDER: Thank you, Mrs. Jackson.

(Witness leaves the witness stand.)

MR. LINDER: Your Honor, we have no further witnesses.

THE COURT: You rest?

MR. LINDER: Yes, we rest at this time.

THE COURT: All right. Do you have anything?

MR. RUSSELL: May we have just a moment?

(Brief off-the-record interval.)

MR. O'MALLEY: May we approach the bench?

THE COURT: Surely.

(At sidebar)

MR. O'MALLEY: In conformity with our discussions at the pre-trial session, we would like the opportunity, Your Honor, to present our defense at a later date. Meanwhile, it is our intention to file a motion to dismiss for failure to state a cause of action. The plaintiff has indicated that his entire case has been presented. We believe the plaintiff has not met his burden, and we would like an opportunity to present [25] to Your Honor a brief in answer to the brief submitted by plaintiff's counsel, and then to argue the motion to dismiss without prejudice to our right to present our defense at a later date.

THE COURT: How much time do you want?

MR. O'MALLEY: Well, whatever appears a reasonable time. I should think a few weeks.

THE COURT: It's all right so long as we're going to have an understanding that the service will not be disconnected.

MR. RUSSELL: The defendant would stipulate that the temporary restraining order if need be be continued

until some further date providing the opportunity to take the steps Mr. O'Malley has indicated.

THE COURT: All right. How much—Do you want fifteen days to get your motion and brief prepared and submitted? Is that enough time?

MR. O'MALLEY: Well, time has a way of speeding by. Instead of fifteen days, may I suggest three weeks?

THE COURT: Sure. You have no objection to that, do you?

MR. LINDER: I have no objection except that we did ours in a shorter time than that.

THE COURT: Let me ask you this: Did you really do yours since Tuesday or Monday?

[26] MR. LINDER: Yes.

THE COURT: You had no—you typed out all of that—

MR. LINDER: We had a couple law students, who work parttime in our office, and myself and we researched for about forty-eight straight hours and we wrote it the third day and typed it the fourth day.

THE COURT: Well, you did a good job.

MR. O'MALLEY: I haven't read it yet, but it looks good from what I've seen of it.

THE COURT: I mean it's well documented and well researched. I'm not saying how persuasive it is, but the form. All right. We'll give twenty-one days then, and upon its being filed I would ask counsel to inform me promptly if they desire oral argument or want to submit it on the briefs.

MR. LINDER: I have a question procedural wise. They indicated they're going to file a motion to dismiss. Will that be argued at the same time as oral arguments on briefs in support of the preliminary injunction or—

THE COURT: Well, we'll have to dispose of the motion to dismiss first, because it will be, as I anticipated, on jurisdiction grounds, and if the Court concludes that we do have jurisdiction, then defendant wants the opportunity to present evidence on the merits, and so that they will be argued, if they're argued, separately.

[27] MR. LINDER: I see. I assume then that we'll just be using the same—substantially the same arguments and the same brief.

THE COURT: Yes.

MR. LINDER: Would we be required to file another brief?

THE COURT: No, unless after you receive their brief you want to file a reply brief, you must ask me and I'll consider it at that time.

MR. LINDER: Okay.

THE COURT: In chambers I mentioned the state action problem. I don't mean to limit it to that, of course, but it's up to you, but that is something I would like to do a little more on myself. Okay?

MR. LINDER: So then our office will be notified of—

THE COURT: At the end of twenty-one days when you—you've give him a copy of your brief, and when you get a copy of their brief, if you desire to file a reply brief, you should contact me by phone immediately.

MR. LINDER: Okay.

THE COURT: If you don't, and the defendant has not requested oral argument and you don't desire oral argument, then I'll just take it under advisement with the submission of briefs. If you desire oral arguments, so inform me and we'll set a time down for that.

[28] MR. LINDER: That will be first, and then the motion to dismiss is denied, and then we'll have arguments on the preliminary injunction, and then we'll have testimony by the defendants.

THE COURT: Well, no, we'll have testimony by the defendants if we get beyond the motion.

MR. O'MALLEY: This is what I intended. If you grant our motion, of course, then there's no need for taking the time for the testimony, and contrary, if you rule against us on the motion to dismiss, then we'll present our testimony and then argue whether or not you're entitled to a preliminary injunction.

THE COURT: Right.

MR. LINDER: Fine.

THE COURT: All right. Thank you, Gentlemen.

(End of sidebar)

(Whereupon, Court adjourned at 12:30 P.M.)

CERTIFICATE

I HEREBY CERTIFY that the proceedings and evidence are contained fully and accurately in the stenographic notes taken by me during the foregoing hearing, and that this is a true and correct transcript thereof.

/s/ Emily R. Codden
Official Court Reporter

COURT EXHIBIT No. 7

71-453 Civil

Electric Pa. P.U.C. No. 41
Cancelling
Electric Pa. P.U.C. No. 40

METROPOLITAN EDISON COMPANY
READING, PENNSYLVANIA

ELECTRIC SERVICE TARIFF

Effective in

The territory as defined on
Page No. 5 of this tariff.

Issued April 30, 1971 Effective June 30, 1971

FREDERIC COX, President
Reading, Pa.

NOTICE

This Tariff Makes Increases and Changes
In Existing Rates

GENERAL RULES AND REGULATIONS
THE ELECTRIC SERVICE TARIFF

FILING AND POSTING: A copy of the tariff, comprising the Rates and Rules and Regulations governing the supply of electric service, is filed with the Pennsylvania Public Utility Commission and is posted and open to inspection of the offices of Company.

APPLICATION: Rates of the tariff apply only to Company's Standard Service, namely, alternating current of sixty cycle frequency at designated standard nominal voltages and delivered from overhead supply lines except in certain restricted areas where Company on the basis of customer or load density elects to provide an underground network system of distribution and except where other underground facilities are installed as provided in Rule (23) and/or Rule (32) of Company's General Rules and Regulations.

GENERAL: These Rules and Regulations, filed as a part of the Tariff of Company, set forth the conditions under which service is rendered and govern all classes of service to the extent applicable, unless specifically modified in a particular service classification or written in and made a part of a contract for service.

(1)—*Contract:*

A written application is requested from each Customer, which when accepted by a duly authorized representative of Company, shall constitute the contract between Customer and Company, and no agent has power to modify, alter or waive any of its conditions. Such application, when accepted, shall bind and inure to the benefit of the heirs, executors, administrators, successors or assigns, as the case may be, of the respective parties thereto, but neither Customer nor Customer's assigns shall assign any rights thereunder without the written consent of Company.

Forms of the application, together with the rules and regulations and schedule of rates, will be furnshed upon

application at Company's office. Customer shall, at the time of making application for service, state the conditions under which service will be required and Company shall designate the service classification or classifications applicable to such service. Where more than one service classification applies, Customer shall select the service classification to be applied to his service, and Company will assist Customer after notice of service conditions, in determining which service classification to select, but the responsibility of making the selection shall at all times rest with Customer.

In the event a written application for service has not been made by Customer, service furnished by Company shall nevertheless be rendered in accordance with all the terms and conditions of the applicable service classification. The applicable service classification in a case where more than one service classification might apply, and Customer has failed to make a selection, shall be that service classification which in Company's judgment at the time service is requested, based upon the facts at hand, is most advantageous to Customer.

(2)—*Deposit and guarantee:*

Where an applicant's credit is not established, or where the credit of a Customer with Company has become impaired, or where Company deems it necessary, a deposit or other guarantee satisfactory to Company, may be required as security for the payment of future and final bills, before Company will commence or continue to render service.

Deposits may be required from Customers taking service for a period of less than thirty days, in an amount equal to the estimated gross bill for such temporary period. Deposits may be required from all other Customers, provided that, in no instance, may deposits be required in excess of the estimated gross bill for any single billing period plus one month (the maximum period not to exceed four months) with a minimum of $5.00.

Deposits shall be returned to the domestic Customer when such Customer shall have paid undisputed bills for services over a period of twelve consecutive months. Any

Customer having secured the return of a deposit shall not be required to make a new deposit unless the service has been discontinued or Customer's credit standing impaired through failure to comply with tariff provisions.

All deposits shall bear simple interest at the rate of six percent per annum, payable annually.

On discontinuance of service and payment in full of all service charges and guarantees, Company will refund deposit, or will deduct such unpaid accounts from the deposit and refund the difference, if any. Deposit shall cease to bear interest upon discontinuance of service.

(3)—*Customer's wiring:*

Customer shall communicate with Company, preferably in writing, giving the exact location of the premises to be served. Upon receipt of such information, Company will designate a point of delivery at which all service connections will terminate and near which Customer must provide, free of expense to Company, a suitable place, satisfactory to Company, for the transformer or transformers, meter or meters, or other equipment of Company, which may be necessay for the fulfillment of such contracts as Customer may enter into with Company.

The wiring of Customer's premises for connection to overhead secondary lines must be brought outside of the building wall at a location designated or approved by Company in such a manner that it will be easily accessible for the attachment of Company's wires. Customers desiring an underground secondary service from overhead lines must bear the excess cost thereof, or the full cost thereof, where so provided in Rule (23) hereof, and any such installations made shall be in accord with Rule (23). Construction for service at primary voltage and point of connection will be specified by Company.

When necessary, in the opinion of Company, Customer shall furnish a fireproof structure at a location and of a size and type satisfactory to Company for meters, transformers and other apparatus necessary for supplying service.

There shall be no obligation on the part of Company either to connect or remain connected with any Customer's

wiring or facilities when the installation or maintenance thereof is not in accordance with the provisions of the National Electrical Code and Company's requirements or when the certificate of compliance with the regulations of the National Board of Fire Underwriters, has not been issued by the Middle Department Association of Fire Underwriters or the municipal inspection bureau or by any competent inspection agency.

(4)—*Service installations:*

Service installations shall be in accordance with the National Electrical Code, except as modified by the Company's booklet entitled "Requirements for Service and Meter Installations," and by the following:

Entrance conduits, where used, shall be ¾ inch or larger and shall extend at least 15 feet above the ground line wherever practicable. Entrance conduit inside a building shall be one continuous run to the entrance switch or meter mounting. Approved weather-proofed armored service capable may be used in place of rigid conduit.

Conductors shall extend at least 2 feet outside the service head. The grounded conductor shall be identified by a white braid covering or other approved means of identification.

Company will make all service connections to Company's lines.

All service wiring and conduit on Customer's side of the point of delivery shall be installed by and at the expense of Customer.

In the event that Company shall be required by any public authority to place underground any portion of its mains, wires or services, or relocate any poles or feeders, Customer, at Customer's own expense, shall change the location of Customer's point of delivery to a point readily accessible from the new location as specified by Company.

(5)—*Meter installations:*

Company will install one meter for each type of service as determined by voltage and phase. In general, lighting meters will be located either at a point on the outside of the building where they can be protected from the elemnts, in a manner approved by Company, or they will be located in the basement, as near as practicable to the service entrance. The location selected shall be accessible at all times to both Customer and Company and shall be clean, dry, and free from vibration. In all cases the meter box or cabinet shall be so placed that the meter can be installed five feet from the floor or ground line, unless otherwise specifically authorized by Company. Meters located indoors shall be installed on a meter board, constructed of 7/8 inch clear soft pine or similar wood, painted, and securely fastened to foundation walls with an air space between wall and board.

All meter wiring and conduits shall be installed by and at the expense of Customer.

Where it is desired to place meters on Customer's switchboards, Company will furnish plans for such installation.

Where more than six meters are grouped in one installation, a separate main entrance switch is required. For meter groups less than six, the number of circuits may be such that a main entrance switch is required in order to comply with National Electrical Code.

(6)—*Grounding:*

All single phase services shall be grounded when the potential to ground does not exceed 150 volts. All 3 phase, 4 wire services shall have the neutral grounded. In addition to service grounding, interior wiring shall be grounded as provided by the National Electrical Code.

(7)—*Customer's equipment:*

Customer shall pay the original cost and maintenance of any special installation necessary to meet his particular requirements for service at other than Company's standard voltages and phase, or for the supply of closer

voltage regulation than furnished under Company's standard practice.

Motors rated 1 HP or smaller will be served single phase at either 120 or 240 volts, provided, however, that motors with locked rotor current in excess of 50 amperes must be connected for 240 volts service. Motors rated above 1 HP and not exceeding 5 HP will be served single phase at 240 volts. For motors rated above 5 HP and installations of several small motors aggregating 5 HP or more, information as to the character of service and availability will be furnished on application.

Company will not be responsible for the voltage regulation of service for mixed light and power in installations to a greater extent than required for power installations.

Motors frequently started or motors arranged for automatic control shall be of a type to give maximum starting torque with minimum current, and shall be equipped with controlling devices approved by Company. Customer shall install, at Customer's expense, a reverse-phase relay of approved type on every alternating current motor used for passenger or freight elevators, hoists, pumps or cranes.

Customer shall install in connection with any fluorescent or neon lighting or other lighting or display facilities having similar load characteristics, auxiliary equipment desgned to correct the power factor of such installations to not less than 85%. When the power factor of such installation is, upon test, found to be less than 85%, the use of capacity for billing shall be corrected to 85% power factor.

(8)—*Service and meter installations:*

For information in addition to Rules 3 to 7, inclusive, a booklet entitled "Requirements for Service and Meter Installations" has been prepared for use of architects, contractors, builders, electricians and other interested parties, setting forth methods of electrical installation and construction approved by Company for use in its system. Changes and revisions therein may be made at any time and will be effective upon issue. Copies may be

obtained free upon request addressed to any office of Company.

(9)—*Changes in Customer's wiring and connected load:*

The service connection, transformers, meters and equipment, supplied by Company for the requirement of each Customer, have a definite capacity for this reason Company shall be notified by Customer in writing before any change is made in the load characteristics of Customers' connected load. Customer shall give advance written notice to Company of any proposed increase or decrease in, or change of purpose or of location of, his installation. Failure to give such notice shall render Customer liable for any damage to the meters or their auxiliary apparatus or the transformers or wires of Company, caused by the additional or changed installation.

Where service is supplied under service classifications which base the use of capacity or minimum charge upon Customer's connected load, Customer shall notify Company from time to time of changes in the connected load or service conditions. Company shall have the right at any reasonable time to make an inspection of Customer's installation for the purpose of ascertaining whether or not there have been changes in the connected load or service conditions. The use of capacity or minimum charge, as the case may be, shall thereafter be based upon the changed conditions.

(10)—*Single delivery location:*

The service classifications are based on the rendering of service through a single delivery and metering point. Service rendered to the same Customer at other points of delivery shall be metered and billed separately as provided for.

(11) —*Access to Customer's premises:*

Company's properly identified employees shall have access to the premises of Customer, at all reasonable times, for the purpose of reading meters, testing or inspecting Customer's connected load, repairing, removing or ex-

changing any or all equipment belonging to Company, and for the purpose of removing its property on the termination of its contract or on the discontinuance of service from whatever cause.

(12)—*Responsibility for damage to Customer's or Company's equipment:*

Company will not be responsible for any damages done to or injury sustained by Customer on account of the condition or character of Customer's wiring and equipment, or the wiring and equipment of others on Consumer's premises. Company will not be responsible for the use, care or handling of the electricity delivered to Consumer after the same passes from Company's wires to Consumer's wires, or through the divisional switch separating Consumer's wires and equipment from Company's wires and equipment.

Consumer shall be responsible and pay for damages to Company's equipment on Consumer's premises, except for damage caused thereto by Company or Company agents.

(13)—*Continuity of service:*

Company will use reasonable diligence to provide continuous, regular and uninterrupted service; but Company may interrupt service to any Customer or Customers for the protection of life or property, for making repairs, changes, or improvements in any part of its system for the general good of the service or safety of the public, or when in Company's sole judgment such interruption will prevent or alleviate an emergency threatening the integrity of its system, or will aid in the restoration of service. Should service be interrupted for any of the above reasons, or should service fail by reason of any accident, strike, legal process, governmental interference, or any cause whatsoever beyond its control, the Company shall not be liable for damages, direct or consequential, resulting therefrom.

(14)—*Tampering with Company's equipment:*

In the event evidence is found that Company's meters or other property on Customer's premises are tampered or interfered with, resulting in improper or nonregistration of sevice supplied, the Customer being supplied through such equipment shall pay an amount which Company may estimate is due for service used but not registered on Company's meter, and the cost of any repairs or replacements, and inspections and investigations required. Customer shall, in such case, at Customer's expense, upon notice by Company, make such changes in the service and meter wiring or location as Company may require.

(15)—*Cause for discontinuance of service:*

Company reserves the right to discontinue its service on reasonable notice and to remove its equipment in case of nonpayment of bill or violation of the Pennsylvania Public Utility Commission's or Company's Rules and Regulations; or, without notice, for abuse, fraud or tampering with the connections, meters or other equipment of Company. Failure by Company to exercise this right shall not be deemed a waiver thereof.

Should Company's service be terminated for any cause aforesaid, the minimum charge for the unexpired portion of the term shall become due and payable immediately, provided, however, that if satisfactory arrangements are subsequently made by Customer for reconnection of the service (in which event a reconnection charge of not less than $1.00 must be paid) the immediate payment of the minimum charge for the unexpired portion of the contract term may be waived or modified as the circumstances indicate would be just and reasonable.

Company may refuse its service to, or remove its service from, any installation which, in the judgment of Company, will injuriously affect the operation of Company's system or its service to other Customers.

(15-a)—*Service during forced suspension of operations:*

In the event that a Customer's plant is shut down on account of fire, flood, accident or act of God, or because

of a strike or lockout, causing a forced temporary cessation of a portion or all of a Customer's operation, the contract, upon written request of Customer will be suspended during the period of such cessation and the term of the contract will be automatically extended for a corresponding period. Billings during the suspension will be on the basis of demands and energy supplied during the period, applying the rates and minimum charges of the applicable rate schedule most advantageous to the Customer. Minimum demand blocks of a rate schedule, or minimum hours' use specified in a rate schedule may not be waived when such rate is applied during such temporary periods of suspension. If the billing periods during the suspension are less than a full month, bills will be prorated.

(16)—*Use of other electric service:*

Service is available when used by Customer in conjunction with Customer's private generating plant or other sources of supply, but only under those rate schedules where provision is specifically made for such service, and only under the conditions and at the rates and charges specified in such rate schedules. Emergency generators or sources of supply maintained solely for use in case of interruption of Company's service are not subject to this Rule.

(17)—*Submetering of electricity:*

The supply and service of electric energy by Company will be furnished to owners, tenants or occupants of any building or premises, directly to them as customers of Company through Company-owned individual meters, and will not be supplied through a master meter for submetering or resale by or to any owner, tenant or occupant of any such building or premises.

(18)—*Incorrect registration of meter:*

When, during any period, a meter fails to correctly register the amount of electricity consumed, the amount of the bill will be estimated, giving due consideration to

the amount of use for the periods immediately preceding and subsequent to such defective registration by the meter.

(19)—*Bills:*

Company will endeavor to deliver to Customer, periodically, by mail or messenger, a statement of the amount due Company for service furnished. When the interval between meter readings is substantially greater or less than a month, bills will be computed by prorating charges on the basis of the relationship between the time covered by the meter readings and one month.

Company reserves the right to read the meters and render bills bimonthly. When this is done, the number of kilowatt hours included in each block and the monthly minimum charge shall be doubled. If unusual circumstances occur during a billing period, thus causing inequity to Customer under this rule, proper adjustment shall be made by Company upon prompt disclosure of the facts.

Unless otherwise stated, the service classification sets forth gross and net prices.

Payment of the net amount of a current bill within fifteen days from the post-marked date of billing will be accepted provided all previous undisputed bills have been paid. Bills are due upon presentation and payment may be made at Company offices or designated places for payment of bills. Net rates are payable within fifteen days from the post-marked date of mailing of bill, except on accounts with local governmental bodies or the Commonwealth of Pennsylvania or authorized agencies of the Federal Government, for which thirty days will be allowed. Where the rates are set forth as gross and net under a service classification, the gross amount stated on the bill becomes due on the expiration of the net payment period; the Company may waive the collection of the gross amount on an overdue bill, provided no such waiver has been made on bills of the preceding eleven months. When reasonable doubt exists as to the post-marked date of mailing, the gross amounts shall be applicable unless

Customer by satisfactory evidence establishes the fact that payment is within fifteen days of such date.

Mailed remittances for the net amount for a current bill will be accepted by Company as a tender of payment within the net payment period if the enclosing envelope bears United States Post Office date stamp of the last net payment date, or any date prior thereto.

(20)—*Rights of way and governmental permits and consents:*

Company shall not be obligated to render service to Customer until satisfactory rights from governmental divisions or agencies and from property owners to install, operate and maintain Company's lines and equipment have been obtained.

Customer shall grant Company a right of way for its lines across or along the property owned or controlled by Customer, to the extent that the same is necessary to enable Company to render service to Customer.

(21)—*Service areas:*

Unless stated specifically in the service classification, the various service classifications contained in the tariff apply throughout the entire service area of Company.

(22)—*Character of service:*

Except as otherwise specified in particular service classifications, service will be supplied in the form of 60 cycles, alternating current, at only the standard voltage and phase available or as specified by Company in the locality in which the premises to be served are situated.

(23)—*Company lines:*

Company will construct, own and maintain, overhead supply lines located on highways or on rights of way acquired by Company, used or usable as part of Company's distribution system, and will provide and construct a service line or connection of a single span (nominally 100 feet) of open-wire construction to the first

suitable support provided by Customer, which shall be so located that the service span will be free of obstruction and will be satisfactorily supported at that point as required by its size and weight.

Where underground lines or services are desired by Customer, and where such are determined by Company to be appropriate to its system and to its general plans of development, or where underground is installed in accordance with Rule (32), Company will furnish such underground lines or services provided Customer bears the additional costs thereof in excess of the cost of overhead lines or services, or bears such additional costs as are provided in Rule (32) where applicable. Specifications and terms for such underground construction will be furnished by Company on request. In any other case the entire cost of underground lines and services shall be borne by Customer. Company reserves the right to designate as underground network areas certain areas where Customer or load density warrant, and in such areas underground lines will be installed by Company at its expense, except that the service on Customer's property (but not within the limits of any public way, street or alley) shall be installed, owned and maintained by Customer.

(24)—*Two-phase service:*

Company will continue to supply two-phase service from scott-connected, three-phase transformers to Customers who have not changed to three-phase equipment; provided Customer owns and maintains such transformers. In the event that Customer does not now receive service through Customer-owned transformers, Company will supply such transformers upon Customer's paying an additional 5% of the billing under the applicable service classification.

(25)—*Definition of terms and explanation of abbreviations:*

Adjustment of annual minimum charge. Where the minimum charge is an annual charge, credit for billing

for any given month in excess of the cost of service, based on the rate or monthly minimum charge as specified in the service classification, shall be subsequently allowed when the total of such cost of service for the year shall exceed the annual minimum charge, but in no event shall the bill be less than the tariff minimum or line extension minimum, whichever is greater. The remaining bills in the current twelve-month period shall be issued without regard to the annual minimum charge.

Auxiliary service: The service supplied to connected loads, the wiring for which is entirely separate and apart from the wiring for connected loads supplied from Customer's private generating equipment or other sources. (Also see "Breakdown service", "Standby service" and "Supplemental service").

Breakdown service: The service supplied for use in case of breakdowns or shut down of Customer's private generating equipment or failure of any other source of supply. (Also see "Auxiliary service", "Standby service" and "Supplemental service".)

Connected load: The sum of the HP, KW or KVA input ratings as specified in the service classifications, of all the devices located on Consumer's premises which are connected to Company's service, or which can be connected simultaneously by the insertion of fuses or by the closing of a switch. The manufacturer's nameplate rating may be used to determine the input rating of a particular device. In the absence of such manufacturer's rating, or whenever a test by Company shall indicate improper rating of a device, the rating will be determined on the basis of the kilovolt-amperes required for its operation.

Consumer: Any person, partnership, association or corporation, lawfully receiving service from Company.

Contract capacity: The capacity required for operation of Consumer's equipment, as stated in the application for service. When use of capacity at any time during the month exceeds stated requirements, contract capacity is automatically increased to use of capacity as measured.

Customer: The word "Customer" whenever used in this tariff shall have the same meaning and effect as the word "Consumer" as defined above.

Demand: The rate of use of energy during a specified time interval, expressed in kilowatts or kilovolt-ampere-hours. The word "Demand" wherever used in this tariff shall have the same meaning and effect as the words "Use of Capacity".

Holidays: New Year's Day, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, Christmas Day and all Sundays.

HP, Horsepower: Shall be computed as the equivalent of 750 watts.

Incidental use: As set forth in the service classifications, is considered to be the minor or lesser use of service.

KVA, kilovolt-ampere: Unit of measurement of use of capacity; 1,000 volt-amperes.

KVAH, kilovolt-ampere-hour: Unit of measurement of quantity of energy; an amount equivalent to the use of 1,000 volt-amperes for one hour.

KW, kilowatt: Unit of measurement of use of capacity, 1,000 watts.

KWH, kilowatthour: Unit of measurement of quantity of energy; an amount equivalent to the use of 1,000 watts for one hour.

Load factor: The average hours per month (730 hours) times the maximum 15-minute use of capacity, divided into the actual monthly KWH used.

Month: 1/12 of a year, or the period of approximately thirty days between two regular consecutive readings of Company's meter or meters installed on Consumer's premises.

Bimonthly: 1/6 of a year, or the period of approximately sixty days between two regular consecutive readings of Company's meter or meters installed on Consumer's premises.

Point of delivery: The point at which the service connection of Company terminates and Consumer's wiring and installation begins.

Power factor, in a single-phase circuit, is the ratio of the watts to the volt-amperes; and in a poly-phase circuit, is the ratio of the total watts to the vector sum of the volt-amperes in the several phases. Where the rate schedule provides for power factor correction, the power factor, unless otherwise specified, shall be computed from the registration of the watthour meter and a reactive component watthour meter ratcheted to prevent reverse rotation. The power factor for correction shall be taken as the next highest whole per cent, unless otherwise provided in the rate schedule.

Seasonal service: Supply of service where the premises are occupied only during a portion of each year while service remains connected for the entire year. Service to trailers or other small portable structures used as dwellings shall be treated as seasonal service until permanency of residence has been established.

Standby service: Service supplied by Company as standby power for use by Customer in case of failure of Customer's generating equipment. (Also see "Auxiliary service", "Breakdown service" and "Supplemental service".)

Supplemental service: Service supplied for use on premises where a part of the load is supplied by Customer's generating equipment whether by wiring separated from that which Company supplies, or whether operated in parallel with Company's system or whether connected by double-throw switches. (Also see "Auxiliary service", Breakdown service" and "Standby service".)

Short term service: Supply of service for general lighting or power and industrial lighting for periods of less than one year.

Temporary service: Service supplied for a temporary period of time, usually less than one year. Except as otherwise provided in Rule 31, temporary service will be supplied only under rate schedules which contain specific provisions for such service.

Use of capacity: The maximum rate of use of energy as measured.

The use of capacity shall be measured by commercially accurate indicating or recording instruments or devices,

showing, unless otherwise specified, the greatest 15-minute rate of use of energy.

When the use of capacity by equipment such as hoists, elevators, welding machines, X-rays, fire pumps, or other devices whose operating characteristics impose high starting currents or excessive momentary use of capacity, thereby causing unusual voltage fluctuations, or necessitate the installation of additional facilities, the measured use of capacity may, at option of Company, be increased in the following manner: when the KW connected load of such equipment exceeds the measured use of capacity, 60% of such connected load may be added to use of capacity established by meters, corrected for power factor. In like manner, when the KW connected load of such equipment is less than the measured use of capacity, 40% of such connected load may be added to the use of capacity established by meters corrected for power factor.

(26)—*Water heater specifications:*

Water heaters shall be of the non-inductive type and shall be of not less than thirty gallons tank capacity. Water heaters may be equipped with one heating element, or at Customer's option with two heating elements one of which shall be located near the top of the tank and the other near the bottom of the tank. When equipped with two heating elements, each shall be controlled by an individual and independent thermostat and wired in such manner that both heating elements shall not operate at the same time and so that the capacity of heating elements in use at any one time shall not exceed the capacity of the top heating element. The top heating element when used, with its thermostat, shall be so located as to heat approximately the top one-quarter of the tank volume. The maximum capacity of heating elements that may operate at one time in a tank shall not (C) exceed 3,500 watts for 30-gallon through 39-gallon tanks, 4,500 watts for 40 through 49-gallon tanks, and 5,500 watts for 50-gallon and larger tanks.

(C) Indicates change or addition.

(27)—*Auxilliary, breakdown, standby and supplemental service:*

Auxiliary, breakdown, standby or supplemental service may be supplied under Company's applicable rate schedules where the Rate Schedule contains a provision for such service, provided Company has facilities and capacity available. The rates and charges for such service will be as provided in the rate schedule.

(28)—*Beginning and ending service:*

Any Customer starting the use of service without first notifying and enabling Company to read the meter will be held responsible for any amount due for service supplied to the premises from time of last reading of meter, immediately preceding his occupancy, as shown by Company's books. Customer shall give written notice of intended removal from the premises.

(29)—*Line Extension Rule:*

Company's overhead single-phase distribution system will be extended to supply new Customers, provided the applicants requesting the line extension shall furnish without expense to the Company, satisfactory rights-of-way acceptable to Company necessary for the erection, maintenance and operation of the line extension, including trimming of such trees as Company deems necessary, under the following terms and conditions:

Plan A

Rates and conditions:

The rates applicable to new and existing Customers shall be the various service classifications covering service to domestic, general power and lighting Customers, provided, however, that the minimum charge shall not be less than provided herein, and in no case less than $2.80 per month. (I)

(I) Indicates increase.

Company, in order to be assured a definite revenue to safeguard new investment, may require an applicant for service under the line extension rule to make a nonrefundable advance payment to be applied to satisfy bills as and if they accrue; or to provide other satisfactory security. Such advance payment shall not exceed the total amount of the line extension minimum bills which would accrue over a three-year period of use. Company may also delay construction of any line extension until the house-wiring of Customer contracting to be served therefrom shall have been completed.

Monthly minimum charge:

Domestic and general power and lighting Customers served by single-phase line extensions of $13,200 volts or less, which do not exceed one-third mile per Customer, shall pay a $2.80 monthly (I) minimum extension charge to Company for service supplied under applicable rates. Residential and general Customers served by extensions, the length of which exceed one-third mile per Customer, shall pay an additional minimum charge calculated at the rate of $15.00 per mile for such excess length of line. In the event the rate schedule minimum charge is in excess of the line extension minimum charge, the rate schedule minimum charge will apply.

The minimum charges to all Customers on any single line extension shall be of equal value except that nothing herein contained shall preclude any Customer from assuming more than his pro rata share of the total monthly minimum charge, subject to acceptance thereof by the Company, nor shall this provision operate to decrease the minimum charge of the rate schedules to which this rule is applied.

Customers who desire service under two or more rate schedules shall pay the monthly minimum extension charge for each rate schedule under which service is supplied.

Customers supplied under borderline arrangements with another utility shall assume a minimum charge

(I) Indicates increase.

based upon the combined line extension required to render service.

Additional Customers:

Additional Customers will be supplied from an existing line extension where the monthly minimum charge is $2.80 or more per Customer (I) at the minimum charge in effect on such line extension. Minimum charges in excess of $2.80 per month will be adjusted to lower values (not less than $2.80) to give credit for the addition of any new Customers who have not already been included in establishing the minimum charge.

Additional extensions:

A continuation of an existing line extension, including branches thereto, shall be considered as a new and separate line extension when the addition of the new extension will result in a higher minimum charge to Customers already receiving service from the existing line extension; otherwise Customers on the additional extension shall pay minimum charges determined by combining the original and the additional extension.

Term of contract:

The contract for service shall be for a term of not less than one year, and the minimum charges applicable under this line extension rule shall continue in effect for any continuation or extension of the contract term.

Customer requiring service under other than the above conditions:

In the case where supply facilities and extension conditions other than those prescribed in the line extension rule are required to render service, such as extra facilities for three-phase distribution lines, step-down transformation from transmission lines, unusual costs of tree trimming, or other unusual construction costs, the monthly minimum charges shall be proportionately increased on the basis of 1½% of the estimated construction cost of such additional facilities.

(I) Indicates increase.

Plan B

The Company's obligation to extend its facilities to a new point of delivery is limited to the assumption of new investment to the extent warranted by the revenue anticipated from the business to be served. If the Company is requested to extend or add to its facilities in cases where the extension of such facilities would not be justified under Plan A, the Company will determine from the circumstances of each case what guarantee of revenue or what financing shall be required of applicant.

(30)—*Increased capacity of or extension of facilities:*

Company reserves the right to require Customer to make a cash deposit with Company equivalent to the total cost to Company for the specific investments necessary to render service, the continuance of which may be of questionable permanency. Such cash deposit shall bear no interest and shall be refunded through credits of 10% of the monthly service bills rendered to Customer during the term of the agreed-upon contract. If at the termination of contract any balance of deposit remains unreturned, such balance shall be retained by Company less adjustment for salvage value.

(31)—*Temporary Service to Restricted Areas:*

Within any geographical area which the Company deems to have been formally delineated by proper governmental authority for public use or uses precluding development for permanent private use (hereinafter called a Restricted Area), service to new Customers, improvements, additions or reinforcements to facilities serving existing Customers, or extensions and added facilities originating in or passing through such area for service outside the Restricted Area, will be considered to be temporary and will be supplied only under the terms and conditions stated in this Rule 31. Such temporary service will be supplied when the Company's available installed facilities are of adequate capacity to render the service, provided the Customer pays in advance the estimated cost of establishing the account and of installing and removing all specific facilities especially provided to furnish such

service (hereinafter called Advance Payment). Such temporary service will be furnished under the provisions of any rate schedule applicable to the class of service, whether or not the rate schedule contains a provision for temporary service. If a rate schedule applicable to the class of service supplied contains a multiplying factor for temporary service, such factor shall apply to service supplied hereunder only in those cases where Company would normally have classed the service as temporary for reasons other than this Rule 31. At the option of the Company, bills for temporary service may be prorated and rendered at periodic intervals of less than one month and are due and payable upon presentation.

If the proper governmental authority determines that any existing or proposed installation is appropriate to the permanent plan of development for the public use or uses of such area, the Advance Payment for such facilities will be waived, or if already made, will be refunded, without interest, upon presentation of the receipt therefor, provided the Customer at such time executes a contract with Company for permanent service at such location, and further provided that any amount of advance payment that would have normally been required under the Line Extension Rule (Rule 29) will be retained and the remainder of the Advance Payment, if any, will be refunded to Customer.

The Company designates the Delaware Water Gap National Recreation Area as a Restricted Area and will designate other Restricted Areas when and as required by proper governmental authority.

(32)—*Underground Electric Service in New Residential Developments*

1.A. For the purposes of this rule only, the following terms shall have the meanings indicated for them.

(1) "Development"—Five or more adjoining unoccupied lots in a recorded plan for the construction of single-family residences (detached or otherwise) intended for year-around occupancy, or one or more adjoining lots for the construc-

tion of one or more apartment houses containing an aggregate of five or more family units, if electric service to such residential or apartment house lots necessitates extending the Company's existing distribution lines.

(2) "Distribution line"—An electric supply line from which energy is delivered to one or more service lines.

(3) "Service line"—A line receiving energy from a distribution line and delivering it to (a) the meter, or (b) a disconnection device, controlling service to the residence or apartment building, whichever is nearer the distribution line. *For the purpose of paragraph C (4), that portion of the service line which extends from the curb line will be used for computation of additional charges.*

(4) "Average front-footage"—The quotient of (a) the total front-footage of all lots within the development, excluding the longer side of each corner lot, divided by (b) the total number of lots within the development.

(5) "Rowhouse"—One of a continuous row of five or more single-family residences, in which the house at each end of the row has one-party wall, and each of the intervening houses has two-party walls.

B. All distribution and service lines installed pursuant to an application for electric service within a development shall be installed underground; shall conform to the Company's construction standards and Pa. P.U.C. Electric Regulation Section 402 Rule 16—Wire Crossings; and shall be owned and maintained by the Company. Such installation shall be performed by the Company or by such other entity as the Company may authorize. Any street-lighting lines installed then or thereafter shall also be installed underground, upon terms and conditions prescribed elsewhere in this tariff. The Company shall not be liable for injury or damage occasioned

by the willful or negligent excavation, breakage or other interference with its underground lines by other than its own employees or agents.

C. The Applicant for electric service to a development shall:

(1) At his own cost, provide the Company with easements satisfactory to the Company for occupancy by distribution, service and street-lighting lines and related facilities except in public ways which the Company has the legal right to occupy.

(2) At his own cost clear the ground, in which the aforesaid lines and related facilities are to be laid, of trees, stumps and other obstructions, and rough grade it to within six inches of final grade, so that the Company's part of the installation shall consist only of trenching, laying of the lines, and backfilling to rough grade or the direct plowing-in of electric line as the case may be. At the option of the Company, the Applicant or his agent may perform the trenching and backfilling subject to inspection and approval by the Company.

(3) Request electric service at such time that the aforesaid lines may be installed before curbs, pavements and sidewalks are laid; keep the route of lines clear of machinery and other obstructions when the line installation crew is scheduled to appear; and otherwise cooperate with the Company to avoid unnecessary costs.

(4) Pay to the Company, in advance or under such credit terms as the Company may require, the following charges for each lot for which Applicant seeks electric service:

(a) *Per house lot:*

I. If the trenching and backfilling is not performed or provided by the Applicant, the following charges shall apply:

Lot charge	$195.00

Additional charge, per foot of average front-footage in excess of 100 feet .... $ 1.00

Additional charge, per foot of service line in excess of 75 feet ..... $ 1.00

II. If the trenching and backfilling is performed or provided by the Applicant, a credit of 40 cents per foot shall be applied for each foot of distribution and/or service line trenching and backfilling performed or provided by Applicant.

(b) *Per apartment house lot and rowhouse lot:*

The charge per apartment house lot and rowhouse lot shall be the amount by which the estimated cost of underground facilities exceeds the estimated cost of overhead facilities for serving the lot, as determined by the Company after Applicant has submitted his plans for placement, lay-out, voltage, and other factors affecting such costs.

(c) *Special additional charge:*

Whenever installation of underground facilities to serve a house or apartment house necessitates removal and replacement of paving or sidewalks, or excavation through rock, hard shale or other hard substances, Applicant shall pay an additional charge equal to the extra costs thereby occasioned, as determined by the Company. If requested by Applicant, Applicant shall pay any additional cost incurred by the Company for providing underground facilities that deviate from the Company's established underground construction practices and standards.

D. If the Applicant fails to comply with Paragraph C(2) or C(3), or changes his plot plan after installation of the Company's lines has begun, or otherwise necessitates additional costs by his act or failure to act, such additional costs shall be borne by the Applicant.

E. Whenever the distance from the end of the Company's existing distribution line to the boundary of the development is 100 feet or more, the 100 feet of new distribution line nearest to but outside such boundary shall be installed underground if practicable; and whenever such distance is less than 100 feet from said boundary, all of the new distribution line nearest to but outside such boundary shall be installed underground if practicable. The installation required by this paragraph shall be provided by the Company, without cost to the Applicant.

F. This rule shall apply to all Applications for service to developments, rowhouses and apartments, hereinbefore defined, which are filed after the effective date of the rule.

(33)—*Pennsylvania Public Utility Commission:*

All contracts are taken subject to such changes in or revisions of service classifications or the Rules and Regulations, as may from time to time be filed with or allowed by the Pennsylvania Public Utility Commission.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 71-453

[Filed, Nov. 5, 1971, C. H. Campion, Clerk,
Per JEC, Deputy Clerk]

CATHERINE JACKSON, On Behalf of Herself
and All Others Similarly Situated,
PLAINTIFF

-vs-

METROPOLITAN EDISON COMPANY,
a Pennsylvania Corporation,
DEFENDANT

MOTION TO DISMISS

NOW comes the Defendant above-named and by its Attorneys, Nogi, O'Malley & Harris, moves to dismiss the action and in support thereof assigns the following:

1. The Complaint fails to state a cause of action upon which relief can be granted.
2. The Court lacks jurisdiction over the subject matter because

(a) There is no diversity of citizenship between the parties to this action and
(b) The action complained of does not constitute "state action" within the intendment of the Civil Rights Act.

WHEREFORE, Defendant demands that judgment be entered in its favor and against the Plaintiff.

NOGI, O'MALLEY & HARRIS

BY /s/ Russell J. O'Malley
BY /s/ [Illegible]
Attorneys for Defendant

ORDER

Now, this 30th day of June, 1972, in accordance with memorandum filed this day, defendant's motion is granted and plaintiff's claim is dismissed.

/s/ [Illegible]
United States District Judge

CATHERINE JACKSON, On Behalf of Herself and All Others Similarly Situated

v.

METROPOLITAN EDISON COMPANY, a Pennsylvania corporation.

Civ. No. 71-453.

United States District Court, M. D. Pennsylvania. June 30, 1972.

Civil rights complaint in forma pauperis filed by customer on behalf of herself and all others similarly situated seeking money damages and declaratory relief against utility which allegedly violated customer's constitutional rights when electrical services to her home were summarily terminated without prior notice or hearing on the merits. On a defense motion to dismiss the complaint, the District Court, Nealon J., held that since the utility had acted pursuant to its own regulations and out of a purely private, economic motive, namely, the nonpayment of past due bills, and since no state official participated in the practice complained of, nor was it alleged that the state requested or cooperated in the suspension of services, the customer failed to make a sufficient showing of state involvement in the complained of activity to prevail against a motion to dismiss for lack of action under color of state law, regardless of the state requirement that the utility clearly spell out any penalties to be imposed for nonpayment of bills.

Motion granted and complaint dismissed.

1. Civil Rights—13.12(2)

A complaint which relies on statute in part providing that every person who, under color of state law, subjects any citizen of the United States to the deprivation of any rights, privileges or immunities secured by the Constitution and laws shall be liable in an action at law or

other proper proceeding must initially establish two elements; first, the conduct complained of must have been done under color of state law and, secondly, the conduct must deprive another of rights, privileges or immunities secured by the Constitution of the United States. 42 U.S.C.A. § 1983.

2. Civil Rights—13.5(2)

In determining the presence of state action in a particular case involving an alleged deprivation of rights, a court must examine the facts and circumstances to see if conduct that was formerly private has become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action. 42 U.S.C.A. § 1983.

3. Federal Civil Procedure—1781

Since utility, against which a complaint in forma pauperis was filed by customer who alleged that her constitutional rights had been violated when electrical services to her home were summarily terminated without prior notice, acted pursuant to its own regulations and out of a purely private, economic motive, namely, the nonpayment of bills, and since no state official participated in the activity, nor was it alleged that the state requested or cooperated in the suspension of services, the customer failed to make a sufficient showing of state involvement to prevail against a motion to dismiss for lack of action under color of state law, regardless of state requirement that a utility spell out any penalties to be imposed for nonpayment of bills. 42 U.S.C.A. § 1983; 66 P.S. Pa. §§ 1141, 1144, 1149, 1172, 1217, 1341, 1348.

Alan N. Linder, York, Pa., Richard A. Hesse, Director National Consumer Law Center, Chestnut Hill, Mass., for plaintiff.

Russell O'Malley, Irwin Schneider, Scranton, Pa., Ryan, Russell & McConaghy, Reading, Pa., for defendant.

J. Shane Creamer, Atty. Gen., Curtis Pontz, Deputy Atty. Gen., Dept. of Justice, Harrisburg, Pa., for Commonwealth of Pa.

MEMORANDUM AND ORDER

NEALON, District Judge.

On October 18, 1971, plaintiff filed a Civil Rights complaint in forma pauperis under 42 U.S.C. § 1983 [1] on behalf of herself and all others similarly situated seeking money damages and declaratory and injunctive relief against the defendant utility. Plaintiff alleges that her constitutional rights were violated when electrical services to her home were summarily terminated without prior notice or hearing on the merits. That same day a temporary restraining order was issued by this court enjoining defendant from terminating plaintiff's service until October 22, the day set for the hearing on the preliminary injunction. However, at the hearing on October 22, because of the short notice given to defendants, it was agreed between the parties that plaintiff's service was to be continued in order to allow defendant to respond to plaintiff's complaint. Subsequently, defendant moved to dismiss the complaint on the grounds that (1) the court lacks subject matter jurisdiction in that the defendant utility did not act under color of state law and (2) the complaint fails to state a cause of action on which relief can be granted. Numerous briefs having been filed, this motion is now before the court for decision.

In her complaint, plaintiff alleges that her service was terminated because she was unable to pay Metropolitan Edison for past due utility bills. Plaintiff disputes the validity of the bill in that she alleges that she is not wholly responsible for it since one James Dodson, a former co-occupant of the premises, is the party who originally subscribed for the services and had agreed to pay the bill. Finally, plaintiff contends that she has made several tenders of partial payments which were rejected by the utility company.

[1] Any question as to the jurisdiction of this court under 28 U.S.C. § 1343 to the extent that it is alleged that a civil rights action lies only for alleged deprivation of personal rights as opposed to property rights was put to rest by the Supreme Court's recent decision in Lynch v. Household Finance Corp., 405 U.S. 538, 92 S.Ct. 1113, 31 L.Ed.2d 424 (1972).

Metropolitan Edison's tariff, filed with the Pennsylvania Utility Commission, provides that the company, on reasonable notice, may discontinue utility services to a customer for nonpayment of utility bills.[2] However, the company's regulations do not require any type of hearing before the service is terminated. Plaintiff insists that the utility's failure to provide a hearing prior to termination constitutes a denial of due process of law. Plaintiff also alleges that because of her indigency she is unable to pay the bill and thus faces automatic termination, whereas a more affluent person could pay the challenged bill and then subsequently attack its validity. Such disparity of treatment, plaintiff claims, is in violation of the equal protection clause of the Fourteenth Amendment.

[1] It is well settled that a complaint which relies on 42 U.S.C. § 1983 must initially establish two elements. First, the conduct complained of must have been done under color of state law. Private action, however wrongful, cannot form the basis for relief under § 1983. Adickes v. S. H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); United States v. Price, 383 U.S. 787, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1966); Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961). Secondly, the conduct complained of must deprive another of rights, privileges, or immunities secured by the Constitution of the United States. See Adickes, *supra*. It is defendant's position in its motion to dismiss that the complaint is fatally defective as to one of these elements, since they insist that Metropolitan Edison did not act under "color of state law" within the meaning of § 1983.

[2] In Tariff No. 41 of the Metropolitan Edison Company, filed with the Pennsylvania Public Utility Commission, Rule 15 provides: "Company reserves the right to discontinue its service on reasonable notice and to remove the equipment in case of nonpayment of bill of violation of the Pennsylvania Public Utility Commission's or Company's Rules and Regulations; . . ."

Although the core concept of "state action" has been frequently discussed by the Supreme Court, an exact definition has never been formulated.

> ". . . to fashion and apply a precise formula for recognition of state responsibility . . . is an 'impossible task' which 'This Court has never attempted' . . . Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."

Burton v. Wilmington Parking Authority, 365 U.S. 715, 722, 81 S.Ct. 856, 860, 6 L.Ed.2d 45 (1961).

[2] Thus, in determining the presence of state action in a particular case, a court must examine the facts and circumstances of that case to see if

> "(c)onduct that is formerly 'private' (has) become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action."

Evans v. Newton, 382 U.S. 296, 299, 86 S.Ct. 486, 488, 15 L.Ed.2d 373 (1966).

In essence, the factors upon which plaintiff relies in establishing state action are that (a) the Commonwealth of Pennsylvania has granted Metropolitan Edison, as a privately-owned public utility, a monopoly in the distribution of electricity in the York area and (b) its daily operation is subject to the close supervision and regulation of the Pennsylvania Public Utility Commission. Specifically, plaintiff cites the P.U.C.'s power (1) to regulate and review rates established by the utility;[3] (2) to establish regulations necessary in the supervision of a utility doing business within Pennsylvania;[4] (3) to require that all rules and regulations adopted by the utilities themselves be subject to the approval of the P.U.C.;[5] (4) to

[3] 66 P.S. §§ 1141, 1144, 1149.

[4] 66 P.S. § 1341.

[5] 66 P.S. § 1172.

provide for an inspection and access to any and all facilities and records of public utilities which the Commission deems necessary;[6] and (5) to prohibit discriminatory practices in rates[7] and services,[8] as demonstrating that the operation of Metropolitan Edison "is so intertwined with the state as to make it inseparable from it." Evans v. Newton, *supra* at 299, 86 S.Ct. 486. In addition, plaintiff maintains that the state is involved with the very activity complained of, i.e. the termination of service, in that Pennsylvania P.U.C. Tariff Regs. VIII provides that

> "Every public utility that [imposes] penalties upon its customers for failure to pay bills promptly shall provide in its filed tariffs a rule setting forth clearly the exact circumstances and conditions in which the penalties are imposed . . ."

On the other hand, defendant argues that the overwhelming weight of authority has held that merely because a private corporation, such as Metropolitan Edison, enjoys an economic monopoly which is supervised and controlled by a state-wide regulatory body does not necessarily bring its *every act* within the purview of Section 1983. *See e. g.* Martin v. Pacific Northwest Bell Telephone Co., 441 F.2d 1116 (9th Cir. 1971); Kadlec v. Illinois Bell Telephone Co., 407 F.2d 624 (7th Cir. 1969); Lucas v. Wisconsin Electric Power Co., 322 F.Supp. 337 (E.D.Wis.1970); Taglianetti v. New England Tel and Tel. Co., 81 R.I. 351, 103 A.2d 67 (1954). Defendant contends that in order for state action to exist in the instant case "the state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with *the activity that caused the injury.*" (emphasis added) *See* Martin v. Pacific Northwest Bell Telephone Co., *supra*, 441 F.2d at 1118. Kadlec

[6] 66 P.S. §§ 1217, 1348.

[7] 66 P.S. § 1144.

[8] 66 P.S. § 1172.

v. Illinois Bell Telephone Co., *supra Cf.* Powe v. Miles, 407 F.2d 73, 81 (2d Cir. 1968).[9] I agree.

In Kadlec v. Illinois Bell Telephone Co., *supra*, perhaps the leading case dealing with the question of state action as applied to a regulated public utility, the Seventh Circuit Court of Appeals affirmed a dismissal of a Civil Rights complaint against a telephone company which charged that the company had unconstitutionally terminated certain of plaintiff's commercial telephone services, finding that the termination had not been done under color of state law. The Court held that the acts of the telephone company, taken pursuant to its own regulations, could not be regarded as acts done under color of law simply because the company's regulations had been filed with and approved by an agency of the state. The court elaborated:

> "Motivated by purely private economic interests and pursuant to its *own regulations*, Illinois Bell terminated plaintiffs' Call-Pak service. The only apparent state connection with the termination rests in the fact that defendant company filed its regulations with state authorities; the state in no sense benefited from, encouraged, requested or co-operated in this suspension of service."
>
> ". . . . Here, the nexus between the state and defendant's conduct was not sufficient to maintain an action under § 1983."

407 F.2d at 626.[10]

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[9] Support for this contention is found in Burton v. Wilmington Parking Authority, *supra*, where the court held that "(t)he State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as *a joint participant in the challenged activity*, which, on that account, cannot be considered to have been so 'purely private' as to fall within the scope of the Fourteenth Amendment." (emphasis supplied)

[10] More recently, in another context, the Supreme Court considered the question of whether a state's regulatory scheme constituted state action and noted that the Court has never held that state regulation in any degree whatever would implicate the state in private conduct but would require significant involvement in the proscribed activity. The Court stated that "(h)owever detailed this type of regulation may be in some particular, it cannot be said to in any way foster or encourage racial discrimination . . . (n)or can it be said to make the State in any realistic sense a partner or even a joint venturer in the Club's enterprise". Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 176-177, 92 S.Ct. 1965, 1973, 32 L.Ed.2d 627 (1972).

[3] The only apparent state involvement with the activity complained of here is a Tariff Reg. VIII of the Pennsylvania P.U.C. which requires that every utility that imposes penalties on its customers for failure to pay bills promptly shall clearly set forth in their tariff the exact conditions under which the penalties are to be imposed. However, the mere requirement that Metropolitan Edison clearly spell out any penalties it will impose for non-payment of bills does not clothe Metropolitan Edison with state authority nor transform the defendant's regulations into acts of the state.[11] Rather, the purpose of Tariff Reg. VIII is to insure that public utilities inform their patrons of any possible penalty for failing to pay their bills. As in *Kadlec*, defendant here acted pursuant to its own regulations and out of a purely private, economic motive. No state official participated in the practice complained of, nor is it alleged that the state requested or co-operated in the suspension of service. Thus, plaintiff has failed to make a sufficient showing of state involvement in the activity complained of to prevail against defendant's motion to dismiss. Accordingly, the complaint will be dismissed.

Because of the view I take of this case, it will be unnecessary to consider the merits of plaintiff's contention that her services were terminated in violation of her constitutional rights. I note in passing, however, that plaintiff submitted no evidence indicating disparity of treatment which constituted a denial of equal protection of the law.

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[11] This does not mean, of course, that the State may not, by regulation, require a hearing before service may be terminated by a public utility. While such a regulation may be laudable, it is not constitutionally required.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL No. 71-453

CATHERINE JACKSON, On Behalf of Herself
and All Others Similarly Situated,

v.

METROPOLITAN EDISON COMPANY,
a Pennsylvania Corporation,

NOTICE OF APPEAL

Notice is hereby given that Catherine Jackson, on behalf of herself and all others similarly situated, Plaintiffs above named, hereby appeals to the United States Court of Appeals for the Third Circuit from the Order and Memorandum of the United States District Court, Middle District of Pennsylvania, granting Defendant's motion and thereby dismissing Plaintiff's Complaint, entered in this action on the 30th day of June, 1972.

TRI-COUNTY LEGAL SERVICES

/s/ Alan Linder
ALAN N. LINDER
Esquire
40 North Beaver Street
York, Pennsylvania 17404
Attorney for Plaintiff

July 13, 1972
DATE

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL No. 71-453

CATHERINE JACKSON, On Behalf of Herself
and All Others Similarly Situated,

v.

METROPOLITAN EDISON COMPANY,
a Pennsylvania Corporation,

ORDER

Upon consideration of the motion of plaintiff to restore during the pendency of the Appeal in the case the Temporary Restraining Order issued by this Court against the defendant on October 18, 1971, and subsequently extended by agreement of the parties, and

It appearing to the Court that the status quo should be preserved until the disposition of plaintiff's Appeal by the Court of Appeals for the Third Circuit,

It is Ordered that the Temporary Restraining Order issued on October 18, 1971 and extended by agreement is restored pending determination of plaintiff's Appeal and defendant is enjoined from summarily terminating and discontinuing plaintiff's electrical services, without a prior notice and hearing. Plaintiff is not required to file a Bond.

United States District Judge
/s/ [Illegible]

Dated: August 7, 1972

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 72-1745

CATHERINE JACKSON, On Behalf of Herself
and All Others Similarly Situated,
APPELLANT

vs.

METROPOLITAN EDISON COMPANY,
a Pennsylvania Corporation,

(D.C. Civil Action No. 71-453)

On Appeal from the United States District Court
For the Middle District of Pennsylvania

Present: HUNTER * and WEIS, *Circuit Judges*, and
SCALERA, *District Judge*.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed June 30, 1972, be, and the same is hereby affirmed, with costs taxed against appellant.

ATTEST:

/s/ Thomas E. Quinn
Clerk

August 21, 1973

[COPY]

Certified as a true copy and issued in lieu
of a formal mandate on September 12, 1973.

Test: /s/ Thomas E. Quinn
Clerk, United States Court of
Appeals for the Third Circuit

* Judge Hunter was present at the argument of this case but did not participate in the decision.

CATHERINE JACKSON, On Behalf of Herself
and All Others Similarly Situated,
APPELLANT,

v.

METROPOLITAN EDISON COMPANY,
a Pennsylvania Corporation,

No. 72-1745.

United States Court of Appeals,
Third Circuit.

Argued May 4, 1973.
Decided Aug. 21, 1973.

Civil rights complaint by customer on behalf of herself and all others similarly situated seeking money damages and declaratory relief against utility which allegedly violated customer's constitutional rights when electrical service to her home was summarily terminated without prior notice or hearing on the merits. The United States District Court for the Middle District of Pennsylvania, William J. Nealon, Jr., J., dismissed and the complaint, 348 F.Supp. 954, and appeal was taken. The Court of Appeals, Weis, Circuit Judge, held that since utility acted pursuant to its own regulations and out of a purely private economic motive, namely the nonpayment of bills, and since no state official participated in the activity, customer failed to make a sufficient showing of state involvement to prevail against motion to dismiss for lack of action under color of state law.

Affirmed.

James Hunter, III, Circuit Judge, was present at argument but did not participate in the decision.

1. Civil Rights—13.5(2)

Generally there may be a finding of "state action or action under color of state law," within meaning of civil rights statute, when a private party's action occurred in conjunction with the business in which the state may be considered a partner or joint venturer in a profit-making

field, when a state statute or custom or usage compels the result, when a state agency affirmatively orders or specifically approves the activity in the course of its regulatory rule making, or when a private agency in effect is acting on behalf of and furnishing a typical government service. 42 U.S.C.A. § 1983.

See publication Words and Phrases for other judicial constructions and definitions.

2. Constitutional Law—296(1)

Procedure requiring utility customer to sue for refund after payment of amount claimed to be due the utility, in order to avoid shutoff of service does not violate due process. U.S.C.A.Const. Amend. 14.

3. Corporations—382½

The right to receive utility service does not rise to the level of a constitutional right or an entitlement from the state.

4. Corporations—382½

Right of a customer to receive utility service pending resolution of a dispute between customer and utility is not protected by the Constitution.

5. Federal Civil Procedure—1781

Since utility, against which complaint was filed by customer who alleged that her constitutional rights had been violated when electrical service to her home was summarily terminated without prior notice, acted pursuant to its own regulations and out of a purely private, economic motive, namely the nonpayment of bills, and since no state official participated in the activity, nor was it alleged that state requested or cooperated in the suspension of services, customer failed to make a sufficient showing of state involvement to prevail against a motion to dismiss for lack of action under color of state law. 42 U.S.C.A. § 1983; 66 P.S.Pa. § 1101 et seq.

Alan N. Linder, Tri-County Legal Services, York, Pa., for appellant.

Russell J. O'Malley, Paul A. Barrett, Nogi, O'Malley & Harris, Scranton, Pa., for appellee (Samuel B. Russell, Ryan, Russell & McConagley, Reading, Pa., of counsel).

James R. Adams, Edward J. Weintraub, Deputy Attys. Gen., for Com. of Pa., as amicus curiae.

Edward J. Dailey, National Consumer Law Center, Inc. as amicus curiae.

Jonathan M. Stein, I. David Pincus, David J. Ackerman, Philadelphia, Pa., Fellowship Commission's Committee on Consumer and Citizen Complaints, as amicus curiae.

Before HUNTER * and WEIS, Circuit Judges, and SCALERA, District Judge.

OPINION OF THE COURT

WEIS, Circuit Judge.

Whether the Civil Rights Act was violated when an electric utility shut off service to its customer in the issue to be decided in this case.

The defendant is a privately owned and operated Pennsylvania corporation, granted a monopoly to deliver electricity to the populace in the area of York, Pennsylvania. Like similar utilities in Pennsylvania, it is subject to the provisions of the Public Utility Code [1] and the regulations of the Public Utility Commission authorized by the Act.

The plaintiff was a residential customer of the Metropolitan Edison Company and in October of 1971 was claimed to have owed the defendant for past due bills. She disputed the validity of the charges, asserting that a former co-occupant of the premises was responsible for the amount due. Despite several tenders by the plaintiff of partial payments, the defendant terminated service on October 11, 1971 by disconnecting the line on the company's utility pole on the street near the plaintiff's house.

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* Judge Hunter was present at the argument of this case but did not participate in the decision.

[1] 66 Purdon's (Pennsylvania) Statutes §§ 1101 *et seq.*

The plaintiff then filed suit under the Civil Rights Act, 43 U.S.C. § 1983,[2] asking both damages and injunctive relief.

The district court held an evidentiary hearing on the request for a preliminary injunction. The plaintiff testified that on an occasion about a year previously when the electricity had been disconnected, she left her home for about 45 minutes to telephone the utility and when she returned, the power had been restored. She admitted not receiving bills in the ensuing year but claimed that one Dodson, the co-occupant of the house, had received and paid monthly statements from the defendant.

Although Dodson left the premises about August, 1971, the plaintiff admitted that no bills were received at her home thereafter. She testified that on October 6, 1971 a representative of Metropolitan came to the house inquiring about Dodson and on the following day another employee looked at the meter and told her that somebody had tampered with it. The plaintiff then asked that service be reinstated in the name of Robert Jackson. At the hearing she admitted that this was in fact her 12 year old son.

At the conclusion of the plaintiff's testimony and after the filing of briefs, the district court dismissed the case because there was not "a sufficient showing of state involvement in the complained of activity . . ."[3]

The plaintiff asserts that the defendant's action in arbitrarily terminating service to her was under color of state law because:

1. As a utility, the defendant was closely regulated by the Commonwealth of Pennsylvania;
2. In supplying electricity, Metropolitan Edison was performing a governmental function;

[2] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or caused to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunity secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[3] 348 F.Supp. 954 (M.D.Pa.1972).

3. The defendant was either acting as an agent for the state or a joint participant with it; and
4. The failure to act by the state amounted to "state action".

Litigation between utilities and their customers based on §1983 has been the subject of decisions in the Courts of Appeals of the Eighth, Seventh, and Sixth Circuits, as well as a number of district courts. While on the facts the situations in the reported cases are capable of distinction, an objective appraisal might suggest that the differing results represent a continued uncertainty as to the application of the "color of state law" test.

The Supreme Court has frankly admitted the difficulty of drawing guidelines, and in Moose Lodge 107 v. Irvis, 407 U.S. 163, 172, 92 S.Ct. 1965, 1971, 32 L.Ed.2d 627 (1972), Justice Rehnquist wrote:

> "While the principle is easily stated, the question of whether particular discriminatory conduct is private, on the one hand, or amounts to 'State action,' on the other hand, frequently admits of no easy answer. 'Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.' "

While the *Moose* case was concerned with a private club rather than a utility, the following quote is helpful:

> "The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever. Since state-furnished services include such necessities of life as electricity, water, and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from State conduct set forth in the *Civil Rights Cases*, *supra*, and adhered to in subsequent decisions."

The Supreme Court went on the discuss the multiform variety of control that the state exercised over the holder

of a liquor license which the district court had described as "pervasive" and went on to say:

> "However detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination. Nor can it be said to make the State in any realistic sense a partner or even a joint venturer in the club's enterprise."

The Court thus recognizes the importance of a connection between the state regulation and the proscribed conduct.

Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961), presented a situation where the Court felt that a state agency which leased premises to a restauranteur became a joint-venturer or partner, in a sense, in the enterprise and therefore shared in the discriminatory policies of the private concern. Furmore, in that case the plaintiff could point to a specific state statute which was said to permit the offending conduct.

Adickes v. Kress, 398 U.S. 144, 90 S. Ct. 1598, 26 L.Ed.2d 142 (1970), also was concerned with conduct of a private enterprise said to be in violation of § 1983. The Court there pointed out that the involvement of a policeman in a conspiracy situation provides the necessary ingredient of state action in a claim of violation of the Fourteenth Amendment, whether or not the actions of the officer were officially authorized. The Court also said:

> "Whatever else may also be necessary to show that a person has acted 'under color of [a] statute' for purposes of § 1983 . . . we think it essential that he act with knowledge of and pursuant to the statute." (At pp. 161, 162, f.n. 23, 90 S.Ct. at pp. 1598, 1611)

The Court noted also that a state is responsible for the discriminatory act of a private party if the state by its law has compelled the act.

Public Utility Commission v. Pollak, 343 U.S. 451, 72 S.Ct. 813, 96 L.Ed. 1068 (1952), found "state" involvement where the Commission after conducting hearings affirmatively approved the action which was held to be objectionable. The Court said very specifically and clearly:

> ". . . we do not rely on the mere fact that Capital Transit operates a public utility . . . Nor do we rely upon the fact that . . . Capital Transit now enjoys a substantial monopoly of street railways . . ."

Pollak, therefore, is not authority for the holding that the actions of a public utility which enjoys a monopoly, *ipso facto*, are those of a state agency, nor does it hold that all activities conducted under the auspices of a utility regulatory body satisfy the "color of state law" test.

[1] Though it is difficult to summarize in this complex field and without intended to be all inclusive, it may be said generally that there may be a finding of state action or action under color of state law: [4]

1. When a private party's action occurred in conjunction with a business in which the state may be considered a partner or joint venturer in a profit making field (Burton v. Wilmington, *supra*); or
2. when a state statue or custom or usage compels the result (Adickes v. Kress, *supra*); or
3. when a state agency affirmatively orders or specifically approves the activity in the course of its regulatory rule making (Public Utility Commission v. Pollak, *supra*); or
4. when a private agency in effect is acting on behalf of and furnishing a typical government service (Marsh v. Alabama, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946)).

A brief discussion of the regulatory plan under which the defendant Metropolitan operates is helpful in deciding whether it falls within any of the categories outlined.

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[4] While it has been suggested that "state action" and "action under color of state law" are synonymous, U. S. v. Price, 383 U.S. 780, 794, f.n. 7, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1966), at least one court has indicated its belief that the "color of state law" test may be more demanding. Lavoie v. Bigwood, 457 F.2d 7 (1st Cir. 1972).

The rates which the defendant charges its customers are regulated by and must be approved by the Public Utility Commission. Additionally, the Commission is empowered to issue regulations necessary for supervision of utilities doing business in Pennsylvania, including provisions for inspection and access to facilities and records of the company as the Commission thinks necessary. The Commission is charged with prohibiting discriminatory practices in rates and services, and all rules and regulations of the utilities are subject to its approval.

As part of the rate-setting procedure, the utility must file a tariff with the Commission in compliance with its rules. The Commission Regulation on Tariffs, § VIII, provides that:

> "Every public utility that [imposes] penalties upon its customers for failure to pay bills promptly shall provide in its filed tariffs a rule setting forth clearly the exact circumstances and conditions in which the penalties are imposed . . ."

Pursuant to the regulation, the defendant filed in Tariff No. 41, its Rule 15 (issued April 30, 1971, effective June 30, 1971):

> "Company reserves the right to discontinue its service on reasonable notice and to remove its equipment in case of non-payment of bills or violation of the Pennsylvania Utility Commission's or Company's rules and regulations; or, without notice, for abuse, fraud, or tampering with the connections, meters, or other equipment of company."

Since the record is silent on the point, we assume that no objection was raised to this particular provision of the tariff and, therefore, there was no hearing before the PUC which would have required affirmative action by that body such a occurred in the Pollak case.

While the tariff purports to give the company the right of re-entry upon the customer's premises for purpose of removing its equipment after termination of service, it seems clear from the record that such action was not taken in this case. The service was disconnected by the

defendant at its pole, some distance removed from the home of the plaintiff.

Thus the action of the company in terminating service in this case was taken pursuant to its own regulations using its own personnel without entering onto the customer's private property, without ultizing any state statute or regulation permitting re-entry on the customer's premises, and without any specific direction or authorization of the regulatory body.

The factual background in this case is quite similar to that in Lucas v. Wisconsin Electric Power Company, 466 F.2d 638 (7th Cir. 1972), cert. denied, 409 U.S. 1114, 93 S.Ct. 928, 34 L.Ed.2d 696 (1973), where the Court of Appeals for the Seventh Circuit, sitting en banc, held that there had not been action under color of state law and said:

> "The 'under color of' provision encompasses only such private conduct as it supported by state action. That support may take various forms, but it is quite clear that a private person does not act under color of state law unless he derives some 'aid, comfort, or incentive,' either real or apparent, from the state. Absent such affirmative support, the statute is inapplicable to private conduct.
>
> "We believe that affirmative support must be significant, measured either by its contribution to the effectiveness of defendant's conduct, or perhaps by its defiance of conflicting national policy to bring the statute into play (466 F.2d pp. 655, 656). . . . we believe the significance of that support must be evaluated to determine whether it brings § 1983 into play; otherwise the federal statute would soon supersede vast areas of state administrative regulation." (466 F.2d p. 657)

The Court concluded that the monopoly factor did not in a practical way deprive the customer of an effective remedy nor did it add the necessary state support to private conduct so as to transform an issue of state regulatory policy into a civil rights case.

The Court's action thus affirmed its earlier ruling in Kadlec v. Illinois Bell Telephone, 407 F.2d 624 (7th Cir. 1969), cert. denied, 396 U.S. 846, 90 S.Ct. 90, 24 L.Ed.2d 95 and was consistent with Particular Cleaners v. Commonwealth Edison, 457 F.2d 189 (7th Cir. 1972). *See also*, Martin v. Pacific Northwest Bell Telephone Co., 441 F.2d 1116 (9th Cir. 1971), where that Court said:

> "The fact that a private corporation, such as Pacific Bell, enjoys an economic monopoly which is protected and regulated by the state does not necessarily bring its every act within the purview of Section 1983. [citation], for as well stated in Powe v. Miles, 407 F.2d 73, 81 (2d Cir. 1968), 'the state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury.'"

In Palmer v. Columbia Gas Company, 479 F.2d 153 (1973), a panel of the Court of Appeals for the Sixth Circuit came to a contrary conclusion in a situation where the utility availed itself of a right of entry on the customer's property, that privilege having been granted by a state statute.[5]

The color of state law test was found to have been satisfied in Ihrke v. Northern States Power Company, 459 F.2d 566 (8th Cir. 1972), reversed on mootness, 409 U.S. 815, 93 S.Ct. 66, 34 L.Ed2d 72 (1972), where the city which regulated the utility also received 5% of the company's gross earnings. In that instance it might well be said that while the city did not collect the utility bills, it shared directly in them and to some extent was a joint venture with the power company.[6]

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[5] The Lucas court placed emphasis upon the lack of entry upon the resident's premises and implied that its decision might have been different had the utility availed itself of the state statute to enter the customer's home in order to cut off the power.

[6] *See also Stanford v. Gas Service Co.*, 346 F.Supp. 717 (D.C.Kan. 1972); Hattell v. Public Service Co. of Colorado, 350 F.Supp. 240 (D.C.Colo.1972); Bronson v. Consolidated Edison, 350 F.Supp. 443 (S.D.N.Y. 1972). The fact situations in many of the cases present instances of callous and overbearing conduct by personnel of large utilities, familiar examples of the abuse of authority by those who have little of it. Decisions in favor of the plaintiff in such instances carry strong emotional appeal but are not necessarily persuasive legal authority on the applicability of § 1983. We are not convinced that state courts or the PUC in Pennsylvania would not issue appropriate orders in such outrageous situations as those detailed in Bronson and Palmer, *supra*.

While the Supreme Court in the *Moose Lodge* case refused to prohibit racial discrimination in a private club setting finding no state action in the extensive regulation of the Liquor Control Board, a differing result was reached in *Burton*, *supra*, where a public restaurant was involved but less state control was evident. It may well be that the underlying reasoning for the differing results in the two cases is that in *Moose Lodge* the national prohibition against racial discrimination had come into conflict with the fundamental right of free association, while in *Burton* the tension arose between discrimination and the freedom to operate a business which should have been open to the public at large. In this analysis, it is not at all clear that the result in *Moose Lodge* would not have been different had the discriminating defendant been a public utility rather than a private club.

It is important, therefore, that the issues here be considered not only on the premise of color of state law but that there be an examination and evaluation of the underlying federal rights of the parties, particularly those which the plaintiff espouses.[7] While the plaintiff and *amici* speak of utility service as being "indispensable to life and health" and termination of those services as depriving her of the very "means and necessities of life," we think those characterizations are extreme and serve only to becloud the real issues.[8]

Granted that in today's urban society the supply of electricity to a home does much to make life more comfortable and convenient, its absence in the usual situation

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[7] *See* Williams, The Twilight of State Action, 41 Texas L.R. 347 (1963).

[8] *See* Abernathy, Expansion of the State Action Concept under the Fourteenth Amendment, 43 Cornell Law Quarterly 375, 405 (1958).

does not pose an immediate threat to the life of the occupants. The fact that people, even today, manage to carry on their lives in isolated areas without electricity is proof enough of that.

There is a clear distinction between depriving a community of power where disastrous results might occur if hospital, water purification, and communications facilities were interrupted and the situation in a dwelling when the absence of electrical energy would require manual operation of furnace controls, illumination by kerosene lantern, or refrigeration by ice. We do not minimize the inconvenience of the absence of electrical service or deny that special circumstances may result in serious consequences but simply indicate doubt with the flat assertion that failure to provide this form of energy to a home is a threat to life itself. It is probably more accurate to say that the service is essential to the kind of life we are accustomed to, particularly in an urban society.

Furthermore, as convenient as this utility service is, as desirable as its continuation may be, and as dependent on it we may believe ourselves to be because of its availability and benefits, the fact remains that as of this time at least, the state is not obligated to furnish electricity without charge to its citizens.[9] Those who wish to avail themselves of it must pay for it.[10]

This premise the plaintiff does not dispute here, nor does she deny that if it is proved that she is mistaken in her position on the contested bill, she must pay it or do without electricity.

Clearly then, the right for which the plaintiff now contends is to continue to receive the service and, we assume, pay for it on a current basis until such time as a decision can be had on the disputed items.

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[9] Shelton, The Shutoff of Utility Services for the Poor, 46 Washington L.R. 745, comments that the state of Washington by constitution and statute permits free service to indigents, but apparently there are no requirements that it in fact be done.

[10] *See* the discussion in Michelman, The Supreme Court 1968 Term, Foreward: On Protecting the Poor Through The Fourteenth Amendment, 83 Harvard L.R. 7 (1969).

The utility's response is that the plaintiff may pay the contested charge and then claim for a refund. This process, it is assumed, may be handled informally and perhaps without the necessity of going to court.[11] Though not explicitly stated as such, there is an underlying premise in plaintiff's position that because her income is limited to payments made by the Department of Public Welfare, the refund claim process is not a practical alternative to her. If we are to accede to this contention though, it should apply to every indigent person, not only as to past due bills, but current ones as well. While there may be argument that this would be a socially desirable development,[12] it has not yet been suggested as a constitutionally mandated one or one compelled by congressional enactment.

Plaintiff also asserts that she should be given reasonable notice before her service is terminated. But the defendant has already agreed with that proposition—its tariff provides that "reasonable notice must be given before termination." [13] She thus has been given that right which can be enforced in the state courts or by the Public Utility Commission—at certainly no more expense or inconvenience than resort to the district court required.

Again, we note that the termination of the electricity did not occur until after the plaintiff had been contacted by two representatives of the defendant and had been made aware of irregularities in her account.

[2] Essentially then, if the plaintiff is to prevail, she must establish that the procedure of suing for refund

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[11] While it has been asserted that few of these cases result in litigation because of costs and the small amount involved, we point out that the district magistrates of Pennsylvania and the Small Claims Tribunals of the Common Pleas Court offer opportunities for the customer to present his case at little expense and without the necessity of employing counsel.

[12] *See* Shelton, *supra*, f.n. 9.

[13] Plaintiff has not raised in brief or argument any objection to the provision in the tariff reserving the right to discontinue without notice in the event that there has been tampering with the meter by the customer. Since there is no evidence that it is applicable here, we do not consider it.

after payment of the amount claimed to be due is a violation of due process.

While this method of resolving disputes may be harsh and undesirable, we cannot say that it is unconstitutional. Flora v. United States, 362 U.S. 145, 80 S.Ct. 630, 4 L.Ed.2d 623 (1960), discusses the history and procedures of collection of revenues due the United States which in many instances involves payment of the tax first and then filing a suit for refund. *See also* Great Lakes Dredge & Dock Company v. Huffman, 319 U.S. 293, 63 S.Ct. 1070, 87 L.Ed. 1407 (1943), where the Court did not disapprove a similar procedure in a state tax collection matter.

There has never been any indication from the Supreme Court that this procedure does not comport with constitutional requirement of due process. The reason given for such drastic procedures, that is, that the revenue must be collected in order to keep the government in operation, is the very same argument the utilities invoke as grounds for requirement of payment before further service is rendered.

[3] Plaintiff maintains, also, that because of its importance to everyday living, the right to receive utility service rises to the level of a constitutional right or an entitlement from the state.[14] She cites Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971), as expository of the doctrine that a person may not be deprived of a privilege or right by the state without a hearing. But while that case provides that the state is limited in the procedures that it may use to revoke or suspend an existing driver's license, there is no compulsion to issue one without payment of the customary fee. Moreover, we think that the wrong criterion has been applied. All of life's vital concerns have not been entrusted to the central government, and many, if not most, repose in the state or its agencies. Even so fundamental a human requirement as that of decent shelter has been said not to have a specific constitutional guarantee. Thus, in Lindsey v. Normet, 405 U.S. 56, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972), the Court said:

> "We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality, or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease without the payment of rent or otherwise contrary to the terms of the relevant agreement."

The *Lindsey* case dealt with a summary form of eviction used in Oregon which required payment by the tenant in order to maintain possession and required that any defenses other than payment be reserved to a separate suit. Thus, it is akin to the theory used by the utility in this case, that is, pay first and litigate later. The Supreme Court in the *Lindsey* case found no constitutional objection to such a procedure.[15]

So, too, in San Antonio Independent School District v. Rodriguez et al., 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973), a case dealing with the admittedly important role of education in our society, the Court said:

> "But the importance of a service performed by the State does not determine whether it must be regarded

[14] The "entitlement" cases generally deal with a privilege or right conferred by the state of something which it alone can grant, e.g., in Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971), only the state, not a private company, can issue a driver's license; only a state by appropriation and legislative action may administer and disburse welfare benefits, Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1971), was concerned with the effect of state statutes on the owner's right of possession of personality. We do not believe that there is a property right to be furnished utility service without payment.

[15] The fact that we find no constitutional prohibition to this procedure does not mean that we approve it or recommend it. If we were free to substitute our judgment for that of the PUC and the state legislature, we would require the utility to continue service on payment of current charges while the disputed matters are litigated and allow a time payment arrangement for financially * * *.

as fundamental for purposes of examination under the Equal Protection Clause."

And so, although the plaintiff's position has strong appeal, that is not enough to establish a constitutional basis. We must be alert to the fact that in granting a federal remedy to what is essentially a state problem, there is a further extension of the power of the central government. Intervention is justified in some instances and indeed may be an absolute necessity at times, but such action should not be taken without recognizing the effect there may be upon the concept espoused by the framers of the Constitution that one of the best ways to prevent excessive and abusive government is to disperse its power among many entities and at various levels.

A reluctance, therefore, to enlarge the authority of the federal courts should not simply be viewed as a lack of appreciation for the rights of the individual but, rather, as an indication of concern for the most appropriate method of maintaining the proper balance between governmental power and the citizen's liberties.

Of course, much depends upon the circumstances, and in this case we find no overriding justification for utilization of the Civil Rights Act to intrude the federal courts into what is and should remain a state regulatory process.

[4] Simply stated, we do not find that a right to receive utility service pending resolution of a dispute between a customer and the company is protected by the Constitution of the United States.

[5] Thus, although we would find that there is no federally protected right involved here, we agree with the approach of the district court in applying a narrow view of the "color of state law" test in the weighing and sifting process in the circumstances of this case.[16] We find no error in the decision of the learned District Judge, and the judgment of the District Court, therefore, will be affirmed.

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[16] *See also* Silas v. Smith, 361 F.Supp. 1187 (E.D.Pa.1973).

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 72-1745

CATHERINE JACKSON, On Behalf of Herself
and All Others Similarly Situated,
APPELLANT

v.

METROPOLITAN EDISON COMPANY

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, WEIS and GARTH, *Circuit Judges*, and SCALERA, *District Judge*.

The petition for rehearing filed by Appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ [Illegible]
Judge

Dated: October 25, 1973

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SUPREME COURT OF THE UNITED STATES

No. 73-5845

CATHERINE JACKSON, ETC.,
PETITIONER

v.

METROPOLITAN EDISON COMPANY,

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Third Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

February 19, 1974

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 73-5845

CATHERINE JACKSON, On Behalf of Herself and All Others Similarly Situated,

Petitioner

v.

METROPOLITAN EDISON COMPANY, a Pennsylvania Corporation,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT METROPOLITAN EDISON COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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December 31, 1973

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a privately owned public utility, subject in some particulars to detailed governmental regulation and free of competition within the sphere of its franchise, acts under color of state law when, absent specific statutory authority and governmental participation or significant support and pursuant only to its own rules filed with a regulatory body, it terminates service to a defaulting customer.

2. Whether the right, if any, of a defaulting consumer of privately furnished electrical energy to continued service is federally protected and, if so, whether procedural due process requires, in addition to sufficient notice of intent to terminate, a hearing prior to disconnection.

STATEMENT OF THE CASE

Respondent is a privately owned public utility which furnishes electrical service in the York, Pennsylvania, area. After the account with respect to petitioner's home fell into arrears, after personal notice to her that unless the arrearage was promptly paid service to her would be discontinued, and after failure within the prescribed time to cure the default, respondent terminated service by disconnection at a utility pole near to, but not upon, her premises. No Pennsylvania statute authorizes termination and no regulation of the Pennsylvania Public Utility Commission specifically provides for discontinuance of service for nonpayment of bill. Respondent in so acting avails itself of a right it believes the common law to have recognized from times immemorial, which right it reserved in its own rules and regulations published as its tariff and filed with the Pennsylvania Public Utility Commission. The failure of a utility subscriber to pay for service supplied is not punishable in any way by statute, ordinance, custom or usage, nor are there enforcement procedures, other than those available to creditors generally, designed to effect collection of utility charges past due. True, privately owned utility companies do in fact "shut off" service to those unwilling or unable to pay therefor but, when they do, they do so on their own, so to speak, and are not aided, supported, or in any way encouraged so to do by the state or any of its political subdivisions. They act -- respondent here so

acts -- in exercise of their right to protect their investment by supplying only those from whom they collect. They produce at their own cost and expense electrical energy; it is not given to them by the state; and, while they recognize that theirs is a business affected with a public interest, they do not -- respondent does not -- either concede or believe that they are performing a governmental duty, a function that the state would be obligated to perform if they did not.

SUMMARY OF ARGUMENT

Special and important reasons for allowance of writ of certiorari do not obtain here and, in particular, the decision below is not in conflict either with those of other courts of appeals on the same matter or with applicable decisions of this court, nor does it present an important question of federal law which should be settled by this Court.

ARGUMENT

Rule 23 of this Court's revised rules, Section 1 (c), requires a petition for writ of certiorari to contain the questions presented for review "expressed in the terms and circumstances of the case . . .". Rule 40, Section 3, of the same revised rules, made applicable to briefs in opposition to petitions for certiorari by Rule 24, excuses exclusion from respondent's brief of a statement of questions presented, unless respondent be dissatisfied with their presentation by the petitioner. Respondent, convinced that petitioner's first statement of questions presented is not expressed in the terms and circumstances of this case and, accordingly, being dissatisfied therewith, has attempted to pose the question presented in a way in keeping with the facts thereof. Petitioner's first question states, as a premise, that the public utility in question is required to conform its termination practices to a statutory standard of reasonableness and regulatory review. It also posits that the public utility in question is in fact engaged in a public function, which presupposition, though arguable so long as the supposed public function is not equated with governmental functions performed in fulfillment of governmental duty, is at best an unproved premise from which a conclusion, favorable to petitioner, is sought to be drawn. Lastly, the first question

presented by petitioner neglects to identify the respondent as a privately owned public utility as opposed to a municipal public utility.

There is no quarrel with petitioner's premise that respondent is subject to substantial government regulation for, indeed, it is, in some particulars not bearing on termination procedures, subject to such regulation. There is no quarrel either with petitioner's reference to respondent's freedom from competition within the franchise area or with petitioner's characterization of same as a "monopoly," except that respondent would point out that the monopoly resulting from the lack of competition is more a natural monopoly, an economically natural monopoly, than "a state authorized monopoly" or "a state created monopoly" as variously stated by petitioner.

Contrary to petitioner's assertion that respondent is required to conform its termination practices to a statutory standard of reasonableness and regulatory review, respondent finds no statute specifically authorizing termination nor indeed any specific authorization to terminate from the regulatory body, the Pennsylvania Public Utility Commission.

So far, in respondent's view, does petitioner depart from the rule that statements of questions presented be expressed in the terms and circumstances of the case that respondent fears that, should this Court grant certiorari based on this question, as stated, it may have undertaken to resolve a controversy not before it in this case.

That when petitioner speaks of public function she means a function that would have to be performed by the State in the event that private public utilities should refuse to perform the same is indicated in her petition, at page 6, when she, referring to the Commonwealth of Pennsylvania, speaks of "cost savings" to it "in not having to be the direct supplier of utility service." Respondent knows of no law that compels the state or any of its political subdivisions to perform, as a governmental duty, the functions of supplying private electrical power or service to the citizenry. On the contrary, Pennsylvania's court of last resort seems clearly to have rejected the notion that the furnishing of utility service is the performance of a governmental duty.

In Baily v. Philadelphia, 184 Pa. 594, 39 Atl. 494 (1898) Justice

Mitchell for the Pennsylvania Supreme Court stated (p. 602):

> ". . . However much the idea that the city is not required by its municipal duty to supply its citizens with light in the streets and public places, may seem to fall below the modern conception of a city, it is beyond question on settled legal principles, that in the performance of that function the city acts under authority merely and not under municipal obligation. This was the rule of the common law, and no statute in reference to the city of Philadelphia has altered it . . ."

During the course of the Pennsylvania Supreme Court's opinion in that case, the court indicates that the appellant's various positions bring the court "back again to the preliminary question . . . whether supplying the public places and private citizens with gas for lighting purposes is a strictly muncipal function." (p. 604) And, repeatedly, the Court rejects the concept that the furnishing of such service by a municipality is a municipal function or duty. The Court is categorical in rejecting the contention "that public lighting is a municipal duty." (p. 605)

In Girard Life Insurance Co. v. The City of Philadelphia, 88 Pa. 393 (1879), the Pennsylvania Supreme Court stated:

> ". . . The supplying of water and gas to a City is not a municipal duty. Hence, when the city undertakes to do so, it acts, not by virtue of any rights of sovereignty, but exercises merely the functions of a private corporation: Western Saving Fund Society v. The City, 7 Casey 175; Wheeler v. The City, 27 P. F. Smith 338. It may very well be that when a license has been given by the city to the owner of a house to use the water, such license may not be withdrawn arbitrarily, or for mere caprice. But it is equally clear that the city may adopt such rules in regard to the use of the water and the payment therefor, as the muncipal authorities shall deem expedient."

Respondent believes that the businesses of public utilities are affected with a public interest no less so than were the grain elevators in Chicago as determined in this Court's famous opinion in Munn v. Illinois, 94 U. S. 113 (1876). Respondent would concede that it, and other privately owned public utilities, perform what is customarily regarded as a "quasi public function" but respondent rejects, even as the Pennsylvania Supreme Court has rejected, the idea that, were no private public utilities found who would supply the citizenry of Pennsylvania with power to light their homes, etc., the state or its several political subdivisions would be bound so to do. No governmental function is involved here.

The public function theory, first articulated in Marsh v. Alabama, 326 U. S. 501 (1946), has not been broadened by subsequent decisions of this court

so as to subject privately owned utilities to the constraints of The Fourteenth Amendment to the Constitution of the United States, absent significant state involvement in the complained of private action. It will be remembered that in Marsh the Court concluded that the operation of a privately owned company town constituted the performance of a public function. The administration of cities and towns is unquestionably governmental by nature. In Evans v. Newton, 382 U. S. 296, (1966), in a passage appearing immediately following a quotation from an earlier opinion to the effect that formally private conduct may become so entwined with governmental policies or so impregnated with governmental character as to become subject to the constitutional limitations based upon State action, this Court said:

> ". . . The action of the city in serving as trustee of property under a private will serving the segregated cause is an obvious example. . . A town may be privately owned and managed, but that does not necessarily allow the company to treat it as if it were wholly in the private sector. Thus we held in Marsh v. Alabama, 362 U. S. 501, 66 S. Ct. 276, 90 L. Ed. 265 that the exercise of constitutionally protected rights on the public streets of a company town could not be denied by the owner . . . We have also held that where a State delegates an aspect of the elective process to private groups, they become subject to the same restraints as the State. Terry v. Adams, 345 U. S. 461, 73 S. Ct. 809, 97 L. Ed. 1152."

Other decisions by this Court based upon the public function theory are cases wherein the functions performed were traditionally governmental by nature. Thus, presented with a Georgia statute which directed the suspension of vehicle registration and drivers' licenses of uninsured motorists involved in accidents unless security to cover the damages claimed by the aggrieved parties in reports of the accident was posted, the Court in Bell v. Burson, 402 U. S. 535, 91 S. Ct. 1586 (1971), understandably found governmental function involved. No one can seriously question that the registration of motor vehicles and issuing and suspending drivers' licenses are traditionally functions of a governmental nature.

In Goldberg v. Kelly, 397 U. S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970) this Court found state action to exist in the context of a state's withholding welfare benefits from a relief recipient. There can be little question but that the conferral of welfare benefits is a peculiarly state function.

We have earlier stated that no Pennsylvania statute specifically authorizes a utility to terminate service for nonpayment of bill. But the Petition for Writ of Certiorari states that there is a "commission regulation specifically dealing with the termination of services" and that that Commission Regulation is Pennsylvania Public Utility Commission Tariff Regulation Section VIII quoted in appendix III. We submit that this commission regulation does not specifically deal with service termination for nonpayment of bill. It reads:

> "Every public utility that imposes penalties upon its customers for failure to pay bills promptly, or allows its customers discounts for prompt payment of bills, shall provide in its posted and filed tariffs a rule setting forth clearly the exact circumstances and conditions in which the penalties are imposed or discounts are allowed. The tariff shall also indicate clearly whether, if bills are paid by mail, the date of the postmark will be considered the date of payment."

This commission regulation does not specifically authorize termination and petitioner's statement that it does necessitates a reading into the regulation of a provision not contained therein.

The only provision specifically providing for termination of service for nonpayment of bill is a provision found not in any statute, not in any commission regulation, but in respondent's own rules and regulations posted and filed with the commission as part of its tariff. In respondent's electric tariff No. 4 the company reserves the right to discontinue its service on reasonable notice in case of nonpayment of bill. This is the sole provision specifically dealing with termination for nonpayment of bill and is a provision found only in respondent's own rules and regulations. Petitioner's reference, in her statement of the first question presented, that respondent is "required to conform its termination practices to a statutory standard of reasonableness and regulatory review" is without specific underlying statutory or regulatory substance. The General Assembly of the State of Pennsylvania has not specifically authorized termination for nonpayment of bill nor has the Pennsylvania Public Utility Commission expressly authorized such termination.

It is not the position of the respondent that a public utility company cannot be held liable under the Civil Rights Act. It, like any other private entity, can properly be held liable under that act when, in its enforcement of even its own rules and regulations, it derives significant affirmative support from the

state or any of its political subdivisions. Boman v. City of Birmingham, 280 F. 2d 531 (5th Cir. 1960), is such a case. It appears from Boman that on the same day that the City of Birmingham repealed an ordinance requiring separate seating on city buses of negro and white persons, it adopted a new ordinance providing express authorization for carriers of passengers for hire in the City of Birmingham to formulate and promulgate such rules and regulations for the seating of passengers on public conveyances in their charge as are reasonably necessary to assure the speedy, orderly, convenient, safe and peaceful handling of passengers. More in point, the ordinance also expressly provided that a wilful refusal by any passenger to obey a reasonable request of an operator or driver of such a public conveyance relating to the seating of passengers constituted a breach of the peace. Certain passengers refused, following a request by the driver of a bus, to sit in the rear thereof. They were arrested, charged, convicted, sentenced, and jailed. There is little question but that the rule of the Birmingham Transit Company in relation to the seating of passengers was affirmatively supported by express punitive, municipal action and authority and that, in effect, the City of Birmingham delegated to the privately owned public utility the right to adopt a rule, the violation of which would be punishable by conviction. In such a case the involvement of the state or of one of its political subdivisions is too obvious to dispute. In the case presently before this Court, the rule of Metropolitan Edison relating to termination for nonpayment of bill finds no similar affirmative or significant support in any statute or ordinance of the State of Pennsylvania or City of York known to us. A non-paying subscriber to utility service is not subject to state or municipal penal action. If any such subscriber were subject to such action, a different case would be presented. Indeed, the Court in Boman recognized that the adoption by a private corporate entity of a rule is one thing and express municipal authority providing for punishment for violation thereof is quite another. In Boman the Court said: (p. 535)

> "Of course, the simple company rule that Negro passengers must sit in back and white passengers must sit in front, while an unnecessary affront to a large group of its patrons would not effect denial of constitutional rights if not enforced by force or by threat of arrest and criminal action. Where, as here, the City delegated to its franchise holder the power to make rules for seating of passengers and made the violation

> of such rules criminal . . . we conclude that the Bus Company to that extent became an agent of the State and its actions in promulgating and enforcing the rule constituted a denial of the plaintiff's constitutional rights."

Boman is clearly distinguishable from the case at bar.

Neither does the concurrence of pervasive regulation of public utility companies by a public utility commission and a private utility's exercise of its franchise free of competition within the sphere thereof serve to convert essentially private action into action taken under color of state law.

In Public Utilities Commission v. Pollak, 343 U. S. 451 (1952) this Court passed upon the applicability of the First and Fifth Amendments to the Constitution of the United States to radio programming on the conveyances of a privately owned public utility and, in holding those amendments applicable thereto, made clear those circumstances of the case upon which it was not relying and those aspects of the case upon which it was relying. It is clear that it did not rely upon the fact that the privately owned utility enjoyed a monopoly within the District of Columbia. It indicated that it "recognized" that the operations of the transit company were regulated by the Public Utilities Commission of the District of Columbia. But the feature of the case upon which this Court "particularly" relied was affirmative federal action found to have occurred when, following the Public Utilities Commission directive ordering an investigation, the Commission directed the dismissal of that investigation after formal public hearings. The Court's words were:

> "In finding this relation we do not rely on the mere fact that Capital Transit operates a public utility on the streets of the District of Columbia under authority of Congress. Nor do we rely upon the fact that, by reason of such federal authorization, Capital Transit now enjoys a substantial monopoly of street railway and bus transportation in the District of Columbia. We do, however, recognize that Capital Transit operates its service under the regulatory supervision of the Public Utilities Commission of the District of Columbia which is an agency authorized by Congress. We rely particularly upon the fact that that agency, pursuant to protests against the radio program, ordered an investigation of it and, after formal public hearings, ordered its investigation dismissed on the ground that the public safety, comfort, and convenience were not impaired thereby . . ." (Emphasis supplied)

In Moose Lodge No. 107 v. Irvis, 407 U. S. 163 (1972), this Court had before it a case wherein it appeared that the State of Pennsylvania, through the agency of its Liquor Control Board, pervasively regulated its licensees. Notwithstanding such pervasive regulation, this Court noted:

> "However detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination. Nor can it be said to make the state in any realistic sense a partner or even a joint venturer in the club's enterprise . . . ".

The same is true of the detailed regulation by the Pennsylvania Public Utility Commission of the private holders of utility franchises. However detailed the regulation may be in some particulars, it does not foster or encourage termination of utility service nor does it make Pennsylvania or any of its political subdivisions a partner or joint venturer with private utility companies.

There being no express statutory authorization in Pennsylvania enabling a public utility company to terminate for nonpayment of bill, it remains to inquire whether under Pennsylvania custom or usage public utility companies are regarded as so closely akin in nature to the State as to subject them to constraints of the Fourteenth Amendment to the United States Constitution. In this connection, we cite N.A.A.C.P. v. P.U.C. & Phila. Elec. Co., 5 Commonwealth Ct. 312 (1972) wherein Pennsylvania's Commonwealth Court expressly held as follows: (p. 327-328)

> ". . . We hold that public utility companies, owned and operated by private interests, under Pennsylvania law and usage, are not so involved with State government as to constitute their action, of whatever nature, state action subject to Fourteenth Amendment protection."

The Decision of the Court Below Is Not in Conflict With Decisions of Other United States Circuit Courts of Appeals

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Differences in decisional result in cases presenting differing factual situations should not be ascribed to a presumed uncertainty of applicable law when it is reasonably clear that the approaches taken by the several courts in their attempted resolution of the question are basically common and that the varying results are, in the main, due to major distinguishing factual characteristics. It is undisputable that the Courts of Appeals for the Sixth Circuit in Palmer v. Columbia Gas of Ohio, Inc., 479 F. 2d 153 (6th Cir., 1973) and for the Eighth Circuit in Ihrke v. Northern States Power Company, 459 F. 2d 566 (8th Cir., 1972), decided questions relating to the same matter differently than have the Courts of Appeals for the Seventh Circuit in Lucas v. Wisconsin Electric Power Company, 466 F. 2d 638 (7th Cir., 1972), cert. denied 409 U. S. 1114 (1973) and Kadlec v. Illinois Bell Telephone Co., 407 F. 2d 624 (7th Cir., 1969) and for the Third Circuit in Jackson v. Metropolitan Edison Company, 483 F. 2d 754 (3rd Cir., 1973), but it is not at all clear that any of those courts, if presented the cases which were determined by the other courts, would have decided them differently than they were decided. Though the court below, seeing the decisions of the Courts of Appeals for the Sixth and Eighth Circuits differing from those of the Seventh Circuit, observed that (AII-3):

> "(w)hile on the facts the situations in the reported cases are capable of distinction, an objective appraisal might suggest that the differing results represent a continued uncertainty as to the application of the 'color of state law' test",

one such objective appraisal appearing in a Note entitled "Liability of a Privately Owned Utility Under 42 U. S. C. § 1983", 34 Ohio State Law Journal 222 (1973), discussing Palmer, Lucas and Ihrke, supra, suggests the compatibility rather than any irreconcilability of the cases, the author concluding (p. 227):

> "Taking Palmer and Ihrke together, it appears that, while a very expanded notion of state action is suggested, both

> decisions can be explained along traditional lines of analysis -- significant state involvement is present when a private individual acts pursuant to specific state authorization or when private conduct directly benefits the state. Under such circumstances, a utility, or any other private activity, should be subject to liability under § 1983 . . ."

The decision of the court below is not in conflict with either that of Palmer or Ihrke. In Palmer, the Court of Appeals for the Sixth Circuit was presented with specific statutory authorization expressly permitting (1) termination of utility service for nonpayment of bill and (2) entry upon the premises of the subscriber to effectuate termination. No parallel enactment expressly authorized either termination of service or entry upon the customer's property either in Lucas or in the case at bar. Indeed, there was not any entry upon the premises to effectuate termination of service either in Lucas or in this case. Moreover, the Lucas court strongly implied that its decision would have been different if there had been entry pursuant to such specific statutory authorization. In Ihrke, there was a showing of direct benefit to the City of St. Paul in the form of participation by the city in the revenues of the utility. Significant and substantial state involvement in the activity complained of is the measure by which the presence of non-obvious state action is determined and it exists in some cases, as in Ihrke and Palmer, and in other cases, as in Kadlec, Lucas and the case at bar, it does not. We submit that before a conflict between circuit courts of appeals should be declared to exist two essential subsidiary findings should be made: (1) the existence of differences in result, and (2) a substantial similarity in factual background. Only the first of the two ingredients exists here.

The Decision of the Court Below Is Not in Conflict With Applicable Decisions of This Court

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Since this Court's decision in Burton v. Wilmington Parking Authority, 365 U. S. 715 (1961), and pursuant to the enjoinment in the opinion in that case that in determining the presence of non-obvious state involvement the facts must be sifted and the circumstances weighed, the federal courts have been doing just that, and because facts and circumstances will and do vary, it is not surprising that the results themselves vary, as mentioned earlier. This Court, in Burton, referred to the work of devising some applicable, precise, and definitive standard in the state action context as "an impossible task" and, it would appear, that it is that task which petitioner in this case is asking the Court to undertake. It is interesting to note that the petitioner does not shrink from advocating in the one petition what to respondent seems to be inconsistent positions, namely, that the decision of the court below is in conflict with applicable decisions of this Court and that this case presents an important question of federal law which has not, but ought to be, decided by this Court. But petitioner complains at least as much of what she styles, erroneously, as the lower court's "one dimensional analysis" as she does of its final judgment. The court below is not guilty as charged of having "avoided a comprehensive analysis of the state action issue" (Petition, page 5) and it should be noted that its approach to the problem of resolving the question of state action presence commenced (A.II-4) by confessing that it is difficult in so complex a field to summarize without intending to be all inclusive and by setting forth in general outline the circumstances under which findings of state action may be made. The court then proceeded to rule out each by a process of elimination. Certainly, such an approach cannot correctly be said to constitute a "one dimensional analysis" but is, rather, consistent with a multi-faceted analysis.

The opinion of the lower court is replete with citations to opinions by this Court felt applicable to the resolution of the questions presented by this case. A studied examination of those opinions reveals that they do in fact

support the propositions for which they are cited as well as the judgment sought to be reviewed.

This Case Does Not Involve Important Questions of Federal Law Which Heretofore Have Not Been, But Which Now Should Be, Settled By This Court.

A privately owned utility is not obligated to provide service to its customers free of charge. But it is petitioner's position that even privately furnished power cannot be terminated to a non-paying subscriber without both notice and an opportunity to be heard. To be sure, it does appear that the common law conditions the right of a public utility, whether municipal or private, to terminate for nonpayment upon its giving notice of its intent to terminate. In point of fact, in its self-adopted rules constituting its electric tariff (AIII-7) filed with the regulatory body, respondent itself expressly conditions its reservation of the right to discontinue service in the event of nonpayment upon its first giving reasonable notice. In any event, petitioner's concern is not so much, if at all, with notice(which she received) as it is with there being no provision for a pre-termination hearing procedure. But in this regard, neither the common law nor respondent's electric tariff requires a hearing as a pre-condition to respondent's proper exercise of its right as a private supplier to discontinue service to a non-paying customer. Neither does the Fourteenth Amendment to the Constitution of the United States, either standing alone or read in conjunction with 42 U. S. C. 1983 (The Civil Rights Act), prohibit individuals in their private conduct from depriving one another of property without due process. The Amendment enjoins the states from depriving persons of property without due process of law and the Civil Rights Act enjoins individuals, acting under color of state or territorial statute, ordinance, regulation, custom or usage, from subjecting United States citizens or inhabitants to deprivations of federally secured rights, privileges or immunities. Having no right, state or federal, to free electrical service, petitioner's only federally secured right or privilege is the right to due process of law before being deprived by the state of property. But where, as here, no statute, ordinance, regulation, custom or usage of the

state is involved, which is to say that no state action is present, no right to due process is established. Hence, no important federal question is presented.

CONCLUSION

The action of respondent, a privately owned electrical utility, in terminating service to petitioner for nonpayment of bill for power consumed by her having been taken under circumstances not shown to involve specific statutory or regulatory authorization or participation by the state, was private action. Though the several United States Circuit Courts of Appeals which have considered this question and have adhered to this Court's admonition in Burton, supra, to sift the facts and weigh the circumstances when determining the presence or absence of non-obvious state involvement, have arrived at varying results due to the differing factual situations of the particular cases before them, a conflict among the circuits is not made out by a mere showing of result differences, absent substantially similar factual situations, and uniformity of decisional result in this area is, in any event, neither necessary nor possible. The decision of the court below is not in conflict with applicable decisions of this Court and, because no important federal question is either presented or involved by the petition, none needs be settled.

Respectfully submitted,

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December 31, 1973

SUPREME COURT
OF THE UNITED STATES

CATHERINE JACKSON, ON BEHALF OF HERSELF
AND ALL OTHERS SIMILARLY SITUATED

APPELLANT

V.

METROPOLITAN EDISON COMPANY,
A PENNSYLVANIA CORPORATION

CERTIFICATE OF SERVICE

Paul A. Barrett, Esquire, having been duly sworn according to law, deposes and says that copies of the accompanying Brief for Respondent, Metropolitan Edison Company, in opposition to Petition for Writ of Certiorari were deposited in the United States Mails at the Post Office, Scranton, Pennsylvania, on the 28th day of December, 1973, addressed to the following counsel for Petitioner and other counsel, as indicated, at the addresses hereinafter appearing:

a) Alan Linder, Esquire, Eugene F. Zenobi, Esquire, J. Richard Gray, Esquire, Tri-County Legal Services, 53 North Duke Street, Lancaster, Pennsylvania 17602.

b) Edward J. Dailey, Esquire, and Richard Hesse, Esquire, National Consumer Law Center, 1 Court Street, Boston, Massachusetts 02108.

c) James R. Adams, Esquire, Deputy Attorney General, Department of Justice, Capitol Annex Building, Harrisburg, Pennsylvania 17120.

d) Jonathan M. Stein, Esquire, I. David Pincus, Esquire, David Ackerman, Esquire, Community Legal Services, 313 South Juniper Street, Philadelphia, Pennsylvania.

Paul A Barrett

Paul A. Barrett, Esquire
ATTORNEY FOR RESPONDENT

Sworn to and subscribed
before me this 28th day
of December, 1973

Drue M. Port
Notary Public

My commission expires:

DRUE M. PORT, Notary Public
Scranton, Lacka. Co., Pa. 18503
My Commission Expires Nov. 21, 1977

IN THE
SUPREME COURT OF THE UNITED STATES

NO. 73-5845

Catherine Jackson, On Behalf of Herself and
All Others Similarly Situated

Petitioner

VS

Metropolitan Edison Company, A Pennsylvania
Corporation

Respondent

Petitioner's Reply Brief

Petition For A Writ Of Certiorari To
The United States Court of Appeals
For the Third Circuit

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HISTORY

On November 30, 1973, Petitioner filed this Petition for Writ of Certiorari, contending that the court below erred in holding that the Respondent did not act under color of law in terminating Petitioner's electrical services for non-payment of a bill. On December 31, 1973, Respondent filed a brief in opposition to the within Petition, contending that no state action exists herein namely because the Respondent acts in a purely private capacity in furnishing and terminating utility services,which services the state is under no legal duty to provide. This Reply Brief is filed in response to Respondent's brief, in support of the proposition that Respondent acts under color of law in performing a public function.

SUMMARY OF ARGUMENT

In addition to satisfying the other tests or indices of state action (i.e., substantial regulatory control, beneficiary of a state created monopoly, statutory standard of reasonableness of operations, and failure of the state to exercise its power over a particular activity) the Respondent also acts under color of law in terminating a customer's electrical services because it is engaged in a public function and because it performs the governmental duty of supplying Pennsylvania residents with reasonably continuous utility services. The public function and governmental duty of furnishing reasonably continuous utility services is manifested in the Pennsylvania Public Utility Code. Thus, the Commonwealth of Pennsylvania, through its Public Utility Commission has the statutory duty to enforce the provisions of the Public Utility Code, 66 P.S. §1101 et seq., and to thereby protect the interests of the public by assuring that customers of privately owned, state-regulated public utility companies receive reasonably continuous utility service and not be subject to arbitrary termination of such service for non-payment of a utility bill.

REASON FOR GRANTING THE WRIT

The thrust of Respondent's arguments in opposition to granting of the Writ is that state action does not exist herein unless the Respondent is performing a governmental function which the state is under a legal duty to provide.

Respondent devotes little space to the other tests of state action, (i.e., substantial regulatory control, beneficiary of a state created monopoly, statutory standard of reasonableness and failure of the state to exercise its power over a particular activity) and thus implies that the "public function" test is the sole test to b considered. As set forth in the Petition for Writ of Certiorari, it is the cumulative effect of all of these indices and tests which establish the existence of state action herein. It is submitted that Respondent engages in a public function in supplying reasonably continuous utility services to its customers pursuant to the regulation of the Pennsylvania Public Utility Commission, and thus, for this and the above reasons, Respondent acts under color of law herein.

Respondent argues that the state has no legal duty to provide utility services to its citizens and hence, Respondent's actions in terminating utility services to customers are not acts under color of law. Respondent additionally argues that state action cannot exist in situations including the instant case, where it takes termination action allegedly pursuant to its own rules rather than pursuant to any state participation or authority.

In support of its position that the state has no duty to furnish utility services, Respondent relies on two old Pennsylvania Supreme Court cases. In Bailey vs Philadelphia, 184 Pa. 594 (1898) the court stated that the city had no municipal duty to supply its citizens with public street lighting. However, that case involved a challenge to the legality of a lease by the City of its gas works to a private corporation for the purpose of continuing to provide such services. However, the court noted that whether the legislature may "hereafter impose" upon the City a municipal duty in regard to lighting is a question which it need not consider "until the case shall arise." Supra, p. 606.

In this regard, it is submitted that such a duty has now been "imposed" upon the state by enactment of the Pennsylvania Public Utility Code. It should further be noted that this case and the one below were obviously decided prior to enactment the original Public Utility Code, Act of July 26, 1913, P.L. 1374, amended by Act of May 28, 1937, P.L. 1053, 66 P.S. §1101 et seq.

Respondent also cites the case of Girard Life Ins. Co. vs Philadelphia, 88 Pa. 393 (1879) which states that since the supplying of water and gas to a city was not a municipal duty, the city could terminate the water supply of a corporation which tendered water rent for only one of three years water arrearages, following its purchase of the foreclosed property. However, even though the city may not originally have had a duty to furnish such services, the Court noted that the city may adopt rules regarding use of and payment for such water, but once a "license" has been given by the city to the owner of a house to "use" the water:

> ". . . such license may not be withdrawn arbitrarily, or from mere caprice." Supra, p. 394.

It is submitted that the above statement anticipates and is precisely in keeping with the "entitlement" theory established by recent decisions of this Court. Thus, although the government may not have an original duty to provide its citizens with certain benefits or services, once such a function has been undertaken it cannot be withdrawn arbitrarily. Such a withdrawal of benefits becomes a "taking" of property, which subjects it to the requirements of due process of law. In this regard, it is immaterial whether such benefits are labelled as "rights" or "privileges", since once furnished, they rise to the level of "entitlements", the termination of which is limited by constitutional restraints. Graham vs Richardson, 403 U.S. 365 (1971); Bell vs Burson, 402 U.S. 535 (1971); California Department of Human Resources vs Java, 402 U.S. 121 (1971); Sniadach vs Family Finance Corp., 395 U.S. 337 (1969); Goldberg vs Kelly, 397 U.S. 254 (1970); Sherbert vs Verner, 374 U.S. 398 (1963); Slochower vs Board of Higher Education, 350 U.S. 551 (1956); Speiser vs Randall, 357 U.S. 513 (1958).

In this regard, it is interesting to note that in considering termination of utility services, courts in other jurisdictions have recently held that not only does the government have a duty to furnish utility services, but such services become an entitlement, subject to due process protections. Thus, in Davis vs Weir, 328 F.Supp. 317 (N.D. Ga., 1971) the court stated:

> "In operating as a public service, and an apparent monopoly, the City necessarily is obligated to furnish water to all members of the municipality upon application, subject only to the reasonable, non-dis-

criminatory rules and regulations of the Department of Water Works. The Court believes that the fact that the City has undertaken to provide water to all members of the municipality upon application (which it has the duty to do) renders the important benefit bestowed by the City sufficiently analogous to an 'entitlement' to satisfy any requirement along this line in the recent Supreme Court decisions. Goldberg vs Kelly, supra; Bell vs Burson, supra." Supra, pp. 321, 322.

Also see Ihrke vs Northern States Power Co., 459 F.2d 566 (C.A. 8, 1972) cert. granted, vacated on mootness 34 L.Ed.2d 72 (1973); Palmer vs Columbia Gas Co. of Ohio, 479 F.2d 153 (C.A. 6, 1973); Stanford vs Gas Service Co., 346 F.Supp. 717 (D., Kan., 1973); Bronson vs Consolidated Edison Co., 250 F.Supp. 443 (S.D.N.Y., 1972).

Similarly, in Pennsylvania, the state has a statutory duty to assure that its citizens receive reasonably continuous utility services furnished by privately owned, state regulated public utility companies. The Pennsylvania Public Utility Code, 66 P.S. §1101 et seq., provides the exclusive means of furnishing utility services within the Commonwealth of Pennsylvania, and thus the legislature established the Public Utility Commission, 66 P.S. §452, with the power and duty to administer and enforce the Public Utility Code, 66 P.S. §§461, 462. Pursuant to the Act, no public utility is allowed to furnish services without the prior approval of the Public Utility Commission, 66 P.S. §1121. A public utility must obtain a "Certificate of Public Convenience" from the Commission, which certificate will be granted only after a determination that "the granting of such certificate is necessary or proper for the service, accomodation, convenience or safety of the public." 66 P.S. §1123. In this regard, it has been held that the obligation to serve the public is inherent in every certificate of public convenience and a public utility may not choose to operate only when the weather is pleasant or when there is a chance for profit. Columbo vs Pa. P.U.C., 159 Pa. Super. 483, 48 A.2d 59 (1946). Thus, whether or not the Commonwealth of Pennsylvania originally had a duty to furnish its citizens with utility services is immaterial in view of the fact that the state has undertaken such a function through enactment of the Public Utility Code.

The Public Utility Code requires that every public utility furnish service, and that such service shall also be "reasonably continuous and without unreasonable

interruptions or delay." 66 P.S. §1171. Furthermore, no public utility may "Subject any person to any unreasonable prejudice or disadvantage." 66 P.S. §1172. The Code further provides that the Commission shall have the power and authority to supervise and regulate all utilities doing business within the Commonwealth. 66 P.S. §1341. Finally, the Commission may prescribe such service as shall be "reasonably necessary and proper for the safety, accomodation and convenience of the public . . ." 66 P.S. §1183.

The courts have determined that the primary duty of the Public Utility Commission in the administration of the Public Utility Code is to protect the interests of the public. In Ridley Twp. vs Pa. P.U.C., 172 Pa. Super. 472, 94 A.2d 168 (1953) the court stated that the obligation of the Public Utility Commission to exercise its powers and discretion reasonably applies to the patrons of the utility as well as the utility. Furthermore, the court noted that the "primary object" of the public service laws is at all times to "serve the interests of the public, and not to establish a monopoly or guarantee the security of investment in public service corporations." Supra, p. 172. Also see Sayre vs Pa. P.U.C., 161 Pa. Super. 182, 54 A.2d 95 (1947). In addition, the Pennsylvania Superior Court has held that the powers granted to the Commission were intended to be "broad in order that legislative intent in enactment might be given effect." Reading Co. vs Pa. P.U.C., 188 Pa. Super. 146, 146 A.2d 746 (1959); Sonafelt vs Pa. Public Service Commission, 175 Pa. Super. 164, 103 A.2d 442 (1954); Womelsdorf Consol. Water Co. vs Pa. P.U.C., 160 Pa. Super. 298, 50 A.2d 548 (1947).

Pursuant to its duty to protect the public, the Public Utility Commission must prevent and has prevented a public utility from aribtrary or unreasonable discontinuance of service. 66 P.S. §1171. Thus, where a natural gas company had been supplying gas for public consumption for a municipality, it could not summarily discontinue such service without first applying to and obtaining the consent of the Public Service Commission. People's Natural Gas Co. vs Public Service Commission, 79 Pa. Super. 560. (1922) aff'd. 279 Pa. 252, 123 A. 799, aff'd. 270 U.S. 550 (1923). More recently, it was held by the Commonwealth

Court that where a municipality held itself out to supply water services, the Public Utility Commission did not act unreasonably when it ordered the municipality, which had unilaterally rescinded a contract to provide services, to provide such services to a developer of realty. Borough of Phoenixville vs Pa. P.U.C., 3 Cmwlth. 56, 280 A.2d 471 (1971). Since the Commission is also "charged with the duty of protecting the rights of the public", Citizens Water Co. of Washington, Pa. vs Pa. P.U.C., 181 Pa. Super. 301, 124 A.2d 123 (1956), such due process principles must be applied for the protection of the public in the area of termination of services.

In light of the above, it is apparent that the Commission is performing a statutorily created, governmental function of assuring that customers of public utilities receive reasonably continuous service and not be subject to arbitrary termination procedures. Public utilities are thus performing a governmental duty in providing customers with utility services. The services furnished by the public utility, through supervision of the Public Utility Commission thereby become government "entitlements". Such "entitlements" are subject to due process constraints and thus cannot be terminated arbitrarily or unreasonably.

Respondent cites NAACP vs P.U.C. and Philadelphia Electric Co., 5 Cmwth. Ct. 312 (1972) for the proposition that even if a public utility performs a public function, it does not act under color of law. In this regard, it should be noted that such proposition was made in the context of holding that the powers of the Commission do not imply a power to prohibit discrimination in employment as an incident to a rate determination. The court noted that just because utilities were regulated by the state did not mean that their actions "of whatever nature", constituted state action subject to the Fourteenth Amendment protection. Supra, p. 327-328. Thus, the court implied that certain activities of a public utility will constitute state action, while others will not constitute state action, depending upon the "nature" of the action. The Court specifically noted therein that the PUC had no statutory authority to prohibit discrimination in employment, as such was the province of the Pennsylvania Human Relations Commission.

Respondent also points to the fact that it terminated Petitioner's utility services solely pursuant to its own regulations and in the absence of any state authority. Although, as previously noted by Petitioner, the state authority for Respondent to terminate services herein is contained within the Commission's own rules, Pa. P.U.C. Tariff Regulation, Section VIII, as well as within the statutory requirement that all public utility rules be "reasonable" 66 P.S. §1171, the Respondent is also acting under color of law pursuant to state "custom or usage". 42 U.S.C. §1983. The fact that Respondent may have been able to refuse service if in a private capacity, prior to passage of the Public Utility Code, is immaterial. In the instant case, the Respondent is not acting and cannot act in a private, common law capacity herein, since it is acting solely pursuant to statutory authority in providing utility services. In this regard, this Court has specifically held in Griffin vs Maryland, 378 U.S. 130 (1958), at p. 135 that:

> "If an individual is possessed of state authority and purports to act under that authority, his action is state action. It is irrelevant that he might have taken the same action had he acted in a purely private capacity."

Respondent performs a governmental function and terminates utility services pursuant to governmental authority, and thus acts under color of law in depriving Petitioner of a statutorily created entitlement.

CONCLUSION

Although the Respondent is performing a governmental function, it is the cumulative effect of the performance of such public function in conjunction with all of the other indices of state action that leads to the determination that Respondent acts under color of law herein.

For the above reasons the Petition for Writ of Certiorari should be allowed.

Respectfully submitted,
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1/22/74
Date

APPENDIX

Statutes and Regulations

66 P.S. §452
66 P.S. §461
66 P.S. §462
66 P.S. §1101
66 P.S. §1121
66 P.S. §1123
66 P.S. §1171
66 P.S. §1172
66 P.S. §1183
66 P.S. §1341

Pennsylvania P.U.C. Tariff Regulation, Section VIII

Statutory Provisions

Section 452 Commission established; terms of office; qualifications of members; chairman; compensation; quorum

(a) A commission to be known as the Pennsylvania Public Utility Commission is hereby created. The commission shall consist of five members who shall be appointed by the Governor, by and with the advice and consent of two-thirds of all the members of the Senate. The commissioners first appointed under this act, shall continue in office for terms of two, four, six, eight, and ten years, respectively, from the effective date of this act, but their successors shall each be appointed for a term of ten years. No commissioner, upon the expiration of his term as aforesaid, shall continue to hold office until his successor shall be duly appointed or shall be qualified. Each commissioner, at the time of his appointment and qualification, shall be a resident of the Commonwealth of Pennsylvania, and shall have been a qualified elector therein for a period of at least one year next preceding his appointment, and shall also be not less than thirty years of age.

(b) A member designated by the Governor shall be the chairman of the commission during such member's term of office. When present, the chairman shall preside at all meetings, but in his absence a member, designated by the chairman, shall preside and shall exercise for the time being, all the powers of the chairman.

(c) Each of the commissioners shall receive an annual salary of nineteen thousand dollars ($19,000.00) except the chairman, who shall receive an annual salary of twenty thousand dollars ($20,000.00).

Section 452 (Continued)

(d) Three members of the commission shall constitute a quorum who, for all purposes, including the making of any order or the ratification of any act done or order made by one or more of the commissioners, must act unanimously. 1937, March 31, P.L. 160, §1; 1943, March 31, P.L. 32, §1; 1949, March 31 P.L. 369, No. 32, §1; 1957, July 16, P.L. 949, No. 48, §1.

Section 461 Powers and duties of commission.

The Pennsylvania Public Utility Commission shall exercise the powers and perform the duties exercised and performed prior to the effective date of this act by the Public Service Commission of the Commonwealth of Pennsylvania, and any powers and duties subsequently vested in and imposed upon the Pennsylvania Public Utility Commission by law. 1937, March 31, P.L. 160, §10.

Section 462 Additional powers and duties

The Pennsylvania Public Utility Commission shall have the power and its duties shall be -

(a) To administer and enforce the act, approved the twenty-eighth day of May, one thousand nine hundred thirty-seven (Pamphlet Laws, one thousand fifty-three), designated as the "Public Utility Law", as amended and supplemented, or any law hereafter enacted for the regulation of public utilities.

(b) To certify to the Department of Health any question of fact regarding the purity of water supplied to the public by any public service company or public utility over which it has jurisdiction, when any such question arises in any controversy or other proceeding before it, and upon the determination of such question by the Department of Health, to incorporate the findings of the board thereon in its decision upon the controversy or other proceeding out of which the question arose. 1937, March 31, P.L. 160, §11; 1941, July 8, P.L. 284, §1.

Section 1101 Short title

This act shall be known, and may be cited, as the "Public Utility Law." 1937, May 28, P.L. 1053, art. I, §1.

Section 1121 Organization of public utilities and beginning of service.

Upon the approval of the commission, evidenced by its certificate of public convenience first had and obtained, and not otherwise, it shall be lawful for any proposed public utility.

(a) To be incorporated, organized, or created: Provided, That existing laws relative to the incorporation, organization, and creation of such public utilities shall first have been complied with, prior to the application to the commission for its certificate of public convenience.

(b) To begin to offer, render, furnish, or supply service within this Commonwealth, 1937, May 28, P.L. 1053, art. II, §201. (emphasis added)

Section 1123 Procedure to obtain certificates of public convenience

(a) Every application for a certificate of public convenience shall be made to the commission, in writing, be verified by oath or affirmation, and be in such form, and contain such information, as the commission may require by its regulations. A certificate of public convenience shall be granted by order of the commission, only if and when the commission shall find or determine that the granting of such certificate is necessary or proper for the service, accomodation, convenience, or safety of the public; and the commission in granting such certificate, may impose such conditions as it may deem to be just and reasonable. In every case, the commission shall make a finding or determination in writing, stating whether or not its approval is granted. Any holder of a certificate of public convenience, exercising the authority conferred by such certificate, shall be deemed to have waived any and all objections to the terms and conditions of such certificate.

(b) For the purpose of enabling the commission to make such finding or determination, it shall hold such hearings, which shall be public, and, before or after hearing, it may make such inquiries, physical examinations, valuations, and investigations, and may require such plans, specifications, and estimates of cost, as it may deem necessary or proper in enabling it to reach a finding or determination. 1937, May 28, P.L. 1053, art. II, §203. (emphasis added)

Section 1171 Character of service and facilities

Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. Such service also shall be reasonably continuous and without unreasonable interruptions or delay. Such service and facilities shall be in conformity with the regulations and orders of the commission. Subject to the provisions of this act and the regulations or orders of the commission, every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service. Any public utility service being furnished or rendered by a municipal corporation beyond its corporate limits shall be subject to regulation and control by the commission as to service and extensions, with the same force and in like manner as if such service were rendered by a public utility. 1937, May 28, P.L. 1053, art. IV, §401.

Section 1172 Discrimination in service

No public utility shall, as to service, make or grant any unreasonable preference or advantage to any person, corporation, or municipal corporation, or subject any person, corporation, or municipal corporation to any unreasonable prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to service, either as between localities or as between classes of service, but nothing herein contained shall be deemed to prohibit the establishment of reasonable classifications of service. 1937, May 28, P.L. 1053, art. IV, §402.

Section 1183 Proper service and facilities established on complaint

Whenever the commission, after reasonable notice and hearing, upon its own motion or upon complaint, finds that the service, or facilities of any public utility are unreasonable, unsafe, inadequate, insufficient, or unreasonably discriminatory, or otherwise in violation of this act, the commission shall determine and prescribe, by regulation or order, the reasonable, safe adequate, sufficient, service or facilities to be observed, furnished, enforced, or employed, including all such repair, changes, alterations, extensions, substitutions, or improvements in facilities as shall be reasonably necessary and proper for the safety, accomodation, and convenience of the public, and shall fix the same by its order or regulations. 1937, May 28, P.L. 1053, art. IV, §413.

Section 1341 Administrative authority of commission; regulations.

The commission shall have general administrative power and authority to supervise and regulate all public utilities doing business within this Commonwealth. The commission may make such regulations, not inconsistent with the law, as may be necessary or proper in the exercise of its powers or for the performance of its duties under this act. 1937, May 28, P.L. 1053, art. IX, §901.

Regulatory Provisions

Pennsylvania P.U.C. Tariff

Section VIII DISCOUNT FOR PROMPT PAYMENT AND PENALTIES FOR DELAYED PAYMENT OF BILLS

Every public utility that imposes penalties upon its customers for failure to pay bills promptly, or allows its customers discounts for prompt payment of bills, shall provide in its posted and filed tariffs a rule setting forth clearly the exact circumstances and conditions in which the penalties are imposed or discounts are allowed. The tariff shall also indicate clearly whether, if bills are paid by mail, the date of the postmark will be considered the date of payment.

Federal Statute

42 U.S.C. §1983 Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

IN THE
SUPREME COURT OF THE UNITED STATES

NO. 73-5845

Catherine Jackson, On Behalf of Herself and
All Others Similarly Situated

VS

Metropolitan Edison Company, A Pennsylvania
Corporation

PROOF OF SERVICE

Alan Linder, Esquire, Tri-County Legal Services, duly sworn, deposes and says that copies of the within Petitioner's Reply Brief have been forwarded by United States mail to counsel for Respondent and all other counsel of record, on the 22nd day of January, 1974, to wit, upon:

a) Russell J. O'Malley, Esquire and Paul A. Barrett, Esquire, 420 Miller Building, Scranton, Pennsylvania 18503.

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e) Jonathan Stein, Esquire, I. David Pincus, Esquire, David Ackerman, Esquire, Community Legal Services, 313 South Juniper Street, Philadelphia, Pennsylvania .

TRI-COUNTY LEGAL SERVICES

Alan Linder

Alan Linder, Esq.
Attorney for Petitioner

Sworn and subscribed
to before me this 22nd day
of January, 1974.

Valerie G. Berta
NOTARY PUBLIC

My Commission Expires:

VALERIE G. BERTA
Notary Public, Lancaster, Lancaster Co.
My Commission Expires January 20, 1975

Supreme Court, U. S.
FILED
MAY 15 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-5845

CATHERINE JACKSON, On Behalf of Herself and All Others Similarly Situated,

Petitioner,

v.

METROPOLITAN EDISON COMPANY, a Pennsylvania Corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-5845

CATHERINE JACKSON, On Behalf of Herself and
All Others Similarly Situated,

Petitioner,

v.

METROPOLITAN EDISON COMPANY,
a Pennsylvania Corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The Memorandum and Order of the District Court, dated June 30, 1972, dismissing Petitioner's Complaint, appears in the Appendix (A-64-73) and is reported at *Jackson v. Metropolitan Edison Co.*, 348 F.Supp. 954 (M.D., Pa., 1972). The Judgment and Opinion of the

Third Circuit Court of Appeals dated August 21, 1973, affirming the decision of the District Court, appears in the Appendix (A-76-92), and is reported at 483 F.2d 754 (C.A. 3, 1973).

JURISDICTION

Jurisdiction of the Court below was invoked pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1343(3) and (4). Petitioner's petition for rehearing before the court en banc was denied by the Third Circuit Court of Appeals by Order dated October 25, 1973, without opinion, and appears in the Appendix (A-93). The petition for writ of certiorari was docketed on December 3, 1973 and was timely filed pursuant to 28 U.S.C. §2101(c). This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES, REGULATIONS AND TARIFFS INVOLVED

Pertinent sections of the Pennsylvania Public Utility Law, 66 Pa. Stat. Anno., §§451, et seq., 1101 et seq., are set forth verbatim in the attached Appendix. The following sections however, are of special import:

(a) §1171, establishing a duty of furnishing reasonably continuous service:

(b) §1341, conferring powers on the Pennsylvania Public Utility Commission over public utilities; and

(c) §1122, delegating to utilities authority to terminate service without the prior approval of the Commission.

The following Public Utility Commission Tariff and Electric Regulations are also set forth verbatim:

(a) Section II. Public Notice of Tariff Changes;

(b) Section VIII. Discount for Prompt Payment and Penalties; and

(c) Rule 14D. Access to Meters.

The termination of service tariff of Metropolitan Edison Company Electric Tariff, Electric Pa. P.U.C., No. 41, Rule 15, is also set out in the attached Appendix.

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Respondent public utility acts under color of state law when it terminates a customer's electrical service for nonpayment of a disputed bill, where such utility has the following characteristics and the following relationship to the Commonwealth of Pennsylvania:

(a) It is a state sanctioned monopoly placed by the state in a position of favored economic power;

(b) It performs a public function in the supplying of essential electrical services;

(c) It acts in joint participation with the state, under extensive state regulation; in pursuing mutual goals, under a statutory obligation to furnish "reasonably continuous" electrical services, from which mutual benefits are derived;

(d) The state has specifically authorized, approved and encouraged the Respondent's challenged termination practices;

(e) The state has delegated to the Respondent its statutory responsibility to assure that customers are not arbitrarily and unlawfully deprived of "resonablly continuous" electrical services.

II. Whether due process of law requires that Petitioner must be provided with adequate notice and opportunity to be heard before her essential utility services, which constitute a statutorily conferred entitlement or property right, may be terminated by Respondent for nonpayment of a disputed bill.

STATEMENT OF THE CASE

This case was filed by Petitioner as a civil rights action, pursuant to 42 U.S.C. §1983, challenging the discontinuance of her electrical services by Respondent on October 11, 1971, in the absence of due process of law, for failure to pay a disputed bill.

Petitioner, a welfare recipient,[1] had been a residential utility customer of Respondent Metropolitan Edison Company since March, 1969, when she moved into her home with her two minor children. (A-22). Although Mrs. Jackson was purchasing her home, she also shared some expenses with a co-occupant, one Dodson. (A-22,32). The electric bills were placed in Mrs. Jackson's name until September 1970, after which time they came to Petitioner's home in Dodson's name (A-24), who had assumed full responsibility for payment. Petitioner had been informed by Dodson that he was paying the bills and she believed this to be the case. (A-31, 32). Mrs. Jackson was not informed either by Dodson or the company that the bills were not being paid. (A-24). Although Dodson moved from the premises in August 1971, no electric bills came to Petitioner's home through October 11, 1971, the time of the termination of the services. (A-23, 33).

On Thursday, October 6, 1971, four days prior to the termination of her electric service, representatives of the Respondent company came to Petitioner's home looking for Dodson (A-24). Mrs. Jackson was informed by one of the representatives that there was money owing and that he would return the following Monday to collect $30.00, although no mention was made of

[1] See Plaintiff's In Forma Pauperis Petition and Affidavit filed with and granted by the District Court on October 18, 1971.

the total amount allegedly owing (A-25).[2] However, on that Monday, this representative failed to come, and instead, company workmen came early in the morning to disconnect the electricity at the pole for nonpayment of the bill. (A-25). Thus, Mrs. Jackson's first notice of termination was when she walked out her front door and asked the utility workmen what they were doing. *Id.* Petitioner was not able to reach Respondent's representatives whom she called at the company as well as at home in order to have the service reinstated. (A-25, 26).

Mrs. Jackson received no written or oral notice from the company prior to the termination of her service[3] (A-25, 26), informing her of the termination and reasons therefor, or of opportunities to contest the termination. Significantly, Mrs. Jackson was never even made aware of the exact amount allegedly owing. (A-25).

Petitioner and her children suffered substantial harm as a result of the unexpected termination of her electrical service (A-27). Mrs. Jackson's electricity was shut off for eight days until the district court granted a temporary restraining order on October 18, 1971. (A-13, 14). During this eight day period, Mrs. Jackson

[2] Although some mention of possible "tampering" was made by the company representative, the Court specifically found no evidence of its applicability to this case (A-89, n. 3).

[3] The Court of Appeals noted that the termination of Petitioner's service did not occur until after she had been "contacted" by two representatives and had been made "aware" of "irregularities" in her account. 483 F.2d at 761. However, the representatives at no time informed her that she was in imminent danger of having her electricity terminated for nonpayment of a bill, the amount of which they never informed her.

and her children had no lighting, no heat[4] and no hot water for bathing or cooking (A-27). As a result of the lack of heat, Mrs. Jackson's children caught colds and had to be taken to the doctor (A-27).

Following the termination of Petitioner's utility service on October 11, 1971, (A-26), and her unsuccessful attempts at reinstatement of service, Petitioner filed suit against Respondent in the United States District Court for the Middle District of Pennsylvania, seeking damages, declaratory and injunctive relief to enjoin Respondent from terminating service for nonpayment of a disputed bill in the absence of notice and opportunity for a hearing concerning the merits of the claim. On October 18, 1971, the Court issued a Temporary Restraining Order, ordering Respondent to reinstate Petitioner's service. On October 22, 1971, following a hearing on issuance of a preliminary injunction, the parties stipulated to an extension of the restraining order pending the District Court's decision (A-33, 34). On November 5, 1971, Respondent filed a Motion to Dismiss (A-64), and on June 30, 1972 the lower court issued its Memorandum and Order dismissing Petitioner's Complaint for lack of subject matter jurisdiction, in that the Court held that the Respondent utility did not act under color of law (A-65, 66).

On July 13, 1972, Petitioner filed a Notice of Appeal to the United States Court of Appeals for the Third Circuit (A-74). The Attorney General of the Commonwealth of Pennsylvania was granted leave to submit a brief amicus curiae in support of the Petitioner's position (A-5). On August 7, 1973 the District Court

[4]Mrs. Jackson used her oven to partially heat her home downstairs.

continued the Temporary Restraining Order pending determination of Petitioner's appeal (A-75). The case was argued before the Court of Appeals on May 4, 1973, and, on August 21, 1973, the Court handed down its Opinion and Judgment affirming the Order of the District Court (A-76, 77). Petitioner moved for a rehearing before the court en banc, and on October 25, 1973, that petition was denied without opinion (A-93). A Petition for Writ of Certiorari was filed with and was then granted by this Court on February 19, 1974 and Petitioner was granted leave to proceed in forma pauperis (A-94).

SUMMARY OF ARGUMENT

I. State Action:

A sifting of the facts and a weighing of the circumstances, *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), leads to the conclusion that the Respondent acted under color of state law when it terminated the Petitioner's electrical services for nonpayment of a disputed bill.

Metropolitan Edison is a state sanctioned monopoly, permitted by the state to engage in the utility business in an exclusive geographical area, pursuant to a grant of a "certificate of public convenience" by the Commonwealth of Pennsylvania. 66 Pa. Stat. Anno. §1121. As a result of the certificate, the Respondent is placed in a position of favored economic power. Consequently, since its customers have no alternative means of service, the Respondent has little incentive to refrain from arbitrarily terminating service for nonpayment of a disputed bill. Thus, state action has been found to exist when the government places monopoly power in private hands. *Railway Employees Department v. Hanson*, 351 U.S. 225 (1956); *Lathrop v. Donohue*, 367 U.S. 820 (1961).

The supplying of electrical services is traditionally a public function. *Munn v. Illinois*, 94 U.S. 113 (1877). Such electrical services unquestionably constitute a "necessity of life", *Jones v. City of Portland*, 245 U.S. 217 (1917); *Palmer v. Columbia Gas of Ohio*, 479 F.2d 153 (C.A. 6, 1973), as can be seen in the recent newspaper reports of the deaths of elderly persons resulting from the termination of such services. See *The New York Times*, Dec. 26, 1973.

The Public Utility Law establishes a duty upon utilities to provide "reasonably continuous" service in the public interest. 66 Pa. Stat. Anno. §1171. Quite often, the provision of such service is undertaken by governmental bodies directly.

A finding of state action has thus often resulted from the performance of a public function by a "private" entity. *Marsh v. Alabama*, 326 U.S. 501 (1946); *Evans v. Newton*, 382 U.S. 296 (1966). The furnishing of utility services is similarly a public function justifying a finding of state action. *Ihrke v. Northern States Power Company*, 459 F.2d 566, 569 (C.A. 8, 1972), cert. granted, vacated as moot, 34 L.Ed.2d 72 (1972).

In addition, the quasi-judicial function of determining the lawfulness of the deprivation of property under state authority, is another governmental function performed by Respondent, further justifying a finding of action under color of law herein.

Metropolitan Edison further acts in joint participation with the state, under extensive state regulation, in pursuing mutual goals, under a statutory obligation to furnish "reasonably continuous" service, from which mutual benefits are derived. In this regard, the Commonwealth of Pennsylvania is significantly involved in all areas of the Respondent's operations, similar to

the relationship in *Burton v. Wilmington Parking Authority, supra*. Hence, the Pennsylvania Public Utility Commission regulates the setting of utility rates and the furnishing of services; requires all utilities to file tariffs with the Commission and obtain approval thereon; and has general administrative powers and authority, similar to those of a principal to an agent, including the veto power over utility contract provisions. 66 Pa. Stat. Anno. §§1141, 1142, 1171, 1341, 1360.

In pursuing their mutual goals of furnishing "reasonably continuous" electrical services, both the Respondent and the state derive mutual benefits therefrom. The Respondent receives monopoly status, a guaranteed fair rate of return, and rights of eminent domain and entry on private property. 66 Pa. Stat. Anno. §§1121, 1124, 1141, P.U.C. Elec. Reg., Rule 14D. It is additionally granted power to promulgate its own regulations which have the effect of law. 66 Pa. Stat. Anno. §1171; *Cray v. Pa. Grayhound Lines*, 177 Pa. Super 275, 110 A.2d 892 (1955).

In return, the Commonwealth of Pennsylvania is assured that its citizens receive necessary utility services at a reasonable cost. The state additionally benefits from summary terminations which reduce utility costs and hence rates. At the same time, the state benefits from threatened terminations, since disputed bills are then quickly paid, thereby increasing utility revenues in which the state shares. See *Ihrke v. Northern States Power Company*, 459 F.2d at 568. Finally, the Commonwealth of Pennsylvania directly benefits from the receipt of a fixed portion of the Respondent's revenues, through collection of the Utilities Gross Receipts Tax, 72 Pa. Stat. Anno. §8101.

In addition to the above, the Commonwealth of Pennsylvania has specifically authorized and approved

Metropolitan Edison's termination practices. Pursuant to statutory and regulatory authority, 66 Pa. Stat. Anno. §§1122, 1171, P.U.C. Tariff Reg. Section VIII, the Respondent's constitutionally deficient termination tariff was filed with and was approved by the Commission, by becoming automatically effective sixty days after filing. 66 Pa. Stat. Anno. §1148, P.U.C. Tariff Reg., Section II. The Commission's approval, in conjunction with its silence of Metropolitan Edison's termination tariff, thus warrants a finding of state action similar to that in *Public Utilities Commission v. Pollak*, 343 U.S. 451 (1952); *Palmer v. Columbia Gas of Ohio*, 479 F.2d 153 (C.A. 6, 1973); *Washington Gas Light Co. v. Virginia Electric and Power Co.*, 438 F.2d 248 (C.A. 4, 1971).

Furthermore, the Commonwealth of Pennsylvania has specifically "encouraged" Metropolitan Edison's termination practices. See *Reitman v. Mulkey*, 387 U.S. 369 (1967); *McCabe v. Atchison Topeka and Santa Fe R. Co.*, 235 U.S. 151 (1914). In this case, the Pennsylvania Public Utility Law exempts utilities from the usual requirement of obtaining prior Commission approval for termination of services for nonpayment of a bill. 66 Pa. Stat. Anno. §1122. In addition, the Commission authorizes utilities to promulgate their own termination tariffs, and grants them the right of entry onto customers' premises, which does facilitate the termination procedure. Certainly, because the Respondent has been granted monopoly power, it has little incentive to refrain from arbitrary termination practices.

Finally, the state has delegated to Metropolitan Edison its statutory obligation to assure the provision of "reasonably continuous" services, and has further delegated its responsibility to the public to determine whether termination of service for alleged nonpayment

of bills is in compliance with existing laws and constitutional requirements. This "abdication" of duty, through delegation of authority constitutes state action. *Burton v. Wilmington Parking Authority*, 365 U.S. at 715; See *Fuentes v. Shevin*, 407 U.S. 67 (1972) at 93.

II. Due Process of Law:

Due process of law is necessary to prevent arbitrary and erroneous deprivations of a statutorily conferred entitlement, which, in this case, consists of the Petitioner's statutory right to "reasonably continuous" utility service. Once an entitlement is conferred by the government it cannot be taken away in the absence of due process of law, *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Bell v. Burson*, 402 U.S. 535 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970), especially when such entitlement constitutes a necessity of life. *Palmer v. Columbia Gas of Ohio*, supra.

In view of the numerous instances of utility company errors, employee indifference or hostility, arbitrary utility company termination practices, the availability of legitimate customer defenses and the lack of adequate administrative and legal remedies available to low income consumers, it is readily apparent that the protections of adequate prior notice and opportunity to be heard must be provided to a customer before being deprived of essential utility services. It is submitted that "the stakes are simply too high" to permit unfettered termination practices. *Goldberg v. Kelly*, 397 U.S. at 266.

Since the receipt of continued utility service is a protected property interest, *Board of Regents v. Roth*, 408 U.S. 564 (1972), due process of law in utility termination situations requires adequate prior notice of the nature of the dispute, means of resolution of the dispute and of the right to an oral evidentiary hearing,

prior to the termination of utility services. *Palmer v. Columbia Gas of Ohio*, 479 F.2d at 166; *Bronson v. Consolidated Edison of New York*, 350 F.Supp. 443, 450 (S.D.N.Y., 1972). The customer may be afforded the opportunity for a conference with a company representative and an informal agency hearing, prior to the opportunity for a formal oral hearing.

The remedy of "pay first and litigate later", sanctioned by the Court of Appeals (A-91), is in actuality a "non-alternative", *Bronson*, supra at 449, and is contrary to the teaching of this Court that a wrong will not be permitted to be done merely because it might be undone. *Stanley v. Illinois*, 405 U.S. 645, 647 (1972).

ARGUMENT

I.

RESPONDENT ACTS UNDER COLOR OF STATE LAW WHEN IT TERMINATES PETITIONER'S ELECTRICAL SERVICES FOR NONPAYMENT OF A DISPUTED BILL.

A finding of action under color of state law requires a comprehensive analysis of the cumulative effects of the various state action indices that are involved in the facts of each particular case.

> "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961).

See also *Moose Lodge 107 v. Irvis*, 407 U.S. 163 (1972).

Petitioner submits that a sifting and weighing of the facts and circumstances in this case can lead only to the

conclusion that the Respondent did act under color of law when it terminated Petitioner's electrical services.

A. Respondent is a state sanctioned monopoly which performs a public function and which acts in joint participation with the state under extensive state regulation.

1. *Respondent is a state sanctioned monopoly, placed by the state in a position of favored economic power.*

In Pennsylvania, public utility companies may not engage in business unless a "certificate of public convenience" is conferred upon them by the Pa. Public Utility Commission. 66 Pa. Stat. Anno. §§1121, 1122. Such a certificate may be granted only following a determination by the Commission that the granting of same is necessary or proper for the service, accommodation, convenience or safety of the public. *Id*, §1123. The certificate of convenience sets forth the description of the service and the exclusive territorial limitations of such service. *Id*, §1121.

The granting of a certificate of convenience or exclusive franchise represents a fundamental restructuring of a private anti-competitive market to one under governmental control.[5] It is apparent that such state authorized monopoly status results in the

[5] As commerce developed in medieval England, artificial monopolies tended to disappear, leaving only the "natural monopolies", which by their nature, would not admit of free competition, such as water, gas, telephone and electric companies." Burdick, "The Origin of the Peculiar Duties of Public Service Companies", 11 Columbia L.R. 514 (1911). Because people were "compelled" to resort to these natural monopolies, to obtain a "necessity" such as fuel, "which could otherwise be obtained with great difficulty and at times perhaps not at all", *Jones v. City of*

enjoyment by the utility of a favored economic position.[6] As a result of the lack of competition, the utility customer is afforded little bargaining power,[7] and consequently the utility has little incentive to refrain from terminating service for nonpayment of a disputed bill.[8] Thus, the utility company may elect to terminate a customer's services knowing that the "power, property and prestige" of the state is behind

Portland, 245 U.S. 217, 224 (1917), the states found it necessary to control the potential evil of "odius" common law monopolies, *Shepard v. Milwaukee Gas Light Co.*, 6 Wis. 526, 534 (1858), in the "public interest", *Munn v. Illinois*, 94 U.S. 113 (1877); *Nebbia v. New York*, 291 U.S. 502 (1934), Wyman, "The Law of Public Callings as a Solution to the Trust Problem", 17 Harvard L.Rev. 156 (1904); Arterburn, "The Origin and First Test of Public Callings," 75 U. Pa. L.Rev. 411 (1927).

[6] It is interesting to note that the successful attempts of public utilities to exclude themselves from the anti-trust laws have not been on the grounds that they are not monopolies, but rather on the basis that their monopoly activity constitutes "state action". See *Gas Light Co. of Columbus v. Georgia Power Co.*, 440 F.2d 1135 (C.A. 5, 1971) cert. den., 405 U.S. 969 (1972) (state action due to "intimate involvement" of state in defendant's rate making process), and *Washington Gas Light Co. v. Virginia Electric and Power Co.*, 438 F.2d 248 (C.A. 4, 1971) (state silence constituting "approval" of utility's activities).

[7] The dangers of unfettered termination are great, for as this court recently observed "[if a creditor] knows that he is dealing with uneducated, uninformed consumers with little access to legal help and familiarity with legal procedures, there may be a substantial possibility that a summary seizure of property - however unwarranted - may go unchallenged and the [creditor] may feel that he may act with impunity." *Fuentes v. Shevin*, 407 U.S. 67 (1972), at 83, n. 13.

[8] *Wood v. City of Auburn*, 87 Me. 287, 32A. 906 (1895).

such action. *Burton v. Wilmington Parking Authority*, 365 U.S. at 725.

It is not surprising therefore that state action has been found to exist in situations where the government places monopoly power in the private hands. *Lathrop v. Donohue*, 367 U.S. 820 (1961); *Railway Employees Department v. Hanson*, 351 U.S. 225 (1956); *Lavoi v. Bigwood*, 457 F.2d 7 (C.A. 1, 1972).

2. *Respondent performs an important public function in supplying essential electrical services.*

The supplying of electrical services, often undertaken directly by governmental bodies, is a public function, particularly in view of the fact that the provision of utility service has always been regarded as a "public calling."[9] Thus, as stated by one in its analysis of this issue:

"It is, of course, fundamental that justification for the grant by a state to a private corporation of a

[9] See Note: "Constitutional Safeguards for Public Utility Customers", 48 NYU L.Rev. 493 (1973); Wyman, *Public Service Corporations* (1911). Thus, when private property is "affected with a public interest, it ceases to be *juris privati* only" and becomes clothed with a public interest when it is used in a manner to make it of "public consequence to the community at large." *Munn v. Illinois*, 94 U.S. at 126, quoting from Hale, *De Portibus Maris*, 1 Harg. Law Tracts 78. (emphasis original). However, when such functions are performed by private parties they become subject to governmental regulation. Barnes, "Governmental Regulation of Public Service Corporations," 3 Marquette L. Rev. 65 (1918). Furthermore, it is immaterial that the business was established prior to imposition of the state regulatory control. *Munn v. Illinois*, 94 U.S. at 133. The important issue is the "type" of service being provided, rather than whether a public or private entity actually furnishes the service. *Jones v. City of Portland*, 245 U.S. at 233. See also *Moody's Public Utility Manual*, §38 (1972).

> right or franchise to perform such a public utility service, as furnishing transportation, gas, electricity or the like, on the public streets of the city, is that the grantee is about the public's business. It is doing something the state deems useful for the public necessity or convenience." *Boman v. Birmingham Transit Co.*, 280 F.2d 531, 535 (C.A. 5, 1960).[10]

There can be little doubt that in furnishing utility services, public utilities provide a "necessary service" that is beneficial to the public. Note, supra, 48 N.Y.U.L.Rev. at 507. Thus, in *Jones v. City of Portland*, 245 U.S. 217, (1917) at 223-225, this Court recognized that fuel constituted an "indispensible necessity of life" whose absence would endanger the community as a whole, because "heat is as indispensible to the health and comfort of the people as is light or water." Also see *Moose Lodge 107 v. Irvis*, 407 U.S. at 173 in this regard.

Most courts that have addressed themselves to the issue have found continued utility services to constitute a necessity of life. Thus, in *Bronson v. Consolidated Edison Co. of New York*, 350 F.Supp. 443 (S.D.N.Y., 1972) at 447 the court found "beyond doubt" that electric service can become "vital to the existence",

[10]Courts have specifically noted that furnishing of utility service was a public function and therefore constituted an important index of state action. See *Bronson v. Consolidated Edison of New York*, 350 F.Supp. 443 (S.D.N.Y., 1972); *Stanford v. Gas Service Co.*, 346 F.Supp. 717 (D., Kan., 1972); *Davis v. Weir*, 328 F.Supp. 317, 359 F.Supp. 1023 (N.D., Ga., 1971, 1973); *Palmer v. Columbia Gas of Ohio, Inc.*, 479 F.2d 153 (C.A. 6, 1973); *Ihrke v. Northern States Power Co.*, 459 F.2d 566 (C.A. 8, 1972) *cert. granted, vacated as moot*, 34 L.Ed. 2d 72 (1972).

while the court in *Stanford v. Gas Service Co.*, 346 F.Supp. 717 (D., Kan., 1972) at 720 noted that "unheated shelter affects life itself."[11] Similarly, the districtt court in *Palmer v. Columbia Gas of Ohio*, 342 F.Supp. 241 (N.D., Ohio, W.D., 1972) at 247, stated that tlhe lack of heat in the winter time has "very seriouss effects upon the physical health of human beings,, and can easily be fatal." In like manner the court iin *Davis v. Weir*, 328 F.Supp. 317, 359 F.Supp. 1023 ((N.D., Ga., 1971, 1973) at 322, found that a tenant would "suffer a serious loss" without the benefit of watter services which constituted a necessity. See also *Palmer v. Columbia Gas of Ohio*, 479 F.2d 153 (C.A. 6, 1973) at 168, and *Wood v. City of Auburn*, 87 Me. at 292.[12]

The common law duty to furnish adequate utility service at a fair price was incorporated into state public utility laws.[13] Thus, the Pennsylvania Public Utility

[11]In this regard, in noting electrical service to be a necessity of life, one has to look no further than the evening newspaper for shocking articles reporting the deaths of families and of elderly persons whose utility services had been terminated during the Winter of 1973. See "Tragedies: A Winter's Tale", *Newsweek*, p. 28 (Jan. 8, 1974), and "Man, Seventy-one Freezes to Deatth After Utility Shuts Off Gas", United Press International, appearing in *Boston Globe*, p. 17 (Feb. 9, 1974).

[12]Thee above characterizations of utility service as a necessity of life are in sharp contrast to the casual observation of the Third Circuit that the absence of such service does not pose a "threat"" to the life of the occupants, and that such service constitutes a convenience, rather than a necessity in urban life. (A-88).

[13]At common law, "a person by holding himself out to serve the pubblic, generally assumed two obligations - to serve all who applied;; and if he entered upon the performance of the service, to do iit in a workmanlike manner." Burdick, supra, note 5 at

Law, 66 Pa. Stat. Anno. §1101, et seq., imposes a duty on all public utilities to provide "reasonably continuous" service at a fair price to all customers.[14] *Id*, §§1141, 1171. Such an obligation is inherent in every certificate of public convenience, and hence, a public service corporation may not operate only "when the weather is pleasant" or when there is a "chance for profit." *Columbo v. Pa. P.U.C.*, 159 Pa. Super. 483, 48 A.2d 59 (1946). Similarly, the Commonwealth of Pennsylvania, through its Public Utility Commission, has a statutory duty to assure that public utilities furnish "reasonably continuous" service, 66 Pa. Stat. Anno. §§452, 1171, 1341.[15]

It is precisely because a public utility acts in the public interest in supplying essential utility services

158. Also see Wyman, supra, note 5 at 166, where it is stated that "the situation demands this law, that all who apply shall be served, with adequate facilities for reasonable compensation and without discrimination; otherwise in crucial instances of oppression, inconvenience, extortion and injustice there will be no remedies for those industrial wrongs."

[14]The statutory obligation to supply service to all applicants is one of the main factors to be considered in distinguishing this case from that of *Columbia Broadcasting System v. Democratic National Committee*, 36 L.Ed.2d 772 (1973). In the *CBS* case at least three members of this Court failed to find governmental action in the refusal of a broadcaster to accept a paid editorial advertisement, primarily because of the Congressional intent expressed in the Federal Communications Act that broadcast licensees were not to be treated as common carriers and were not obligated to accept whatever is tendered by members of the public.

[15]Such an obligation consists of the "primary duty" to protect the interests of utility customers, as the "primary object" of the public service laws is at all times to serve the public. *Ridley Township v. Pa. P.U.C., 172 Pa.* Super. 472, 94 A.2d 168 (1953).

under the authority of the Public Utility Law, that it cannot be permitted to terminate such services without due process protections to the customer. Hence, the failure of certain courts to find state action primarily because the utility was deemed by them to be "motivated by purely private economic interests" and pursuant to its "own regulations" in terminating customers' services,[16] is based upon the erroneous premise that a public utility is legally permitted to act solely pursuant to its own private interests, as compared to also being required to act in the public interest. See Sprecher J., dissenting in *Lucas v. Wisconsin Electric Power Co.*, 466 F.2d 638 (C.A. 7, 1972) cert. den. 34 L.Ed.2d 696 (1973).

Since this Court has numerous times held that a private organization exercising significant control over the operation, management or supply of a governmental or public service acts under color of law,[17] a finding of

[16]*Kadlec v. Illinois Bell Telephone Co.*, 407 F.2d 624 (C.A. 7, 1969), cert. den. 396 U.S. 846 (1969); (however, see Kerner J. Concurring); *Taglianetti v. New England Tel. and Tel. Co.*, 81 R.I. 351, 103 A.2d 67 (1954); *Lucas v. Wisconsin Electric Power Co.*, 466 F.2d 638 (C.A. 7, 1972) cert. den. 34 L.Ed.2d 696 (1973) (however, see Sprecher, J. dissenting); *Particular Cleaners v. Commonwealth Edison Co.*, 457 F.2d 189 (C.A. 7, 1972) cert. den. 34 L.Ed.2d 148 (1972); Also see *Martin v. Pacific Northwest Bell Tel. Co.*, 441 F.2d 116 (C.A. 9, 1971).

[17]*Nixon v. Condon*, 286 U.S. 73 (1932); *Terry v. Adams*, 345 U.S. 461 (1953) (running of elections); *Marsh v. Alabama*, 326 U.S. 501 (1946) (operating a company town); *Evans v. Newton*, 382 U.S. 296 (1966) (maintaining a municipal park); *Cooper v. Aaron*, 358 U.S. 1 (1958) (providing free education); and *Food Employees Local 590 v. Logan Valley Plaza*, 391 U.S. 308 (1968) (shopping center); *Smith v. Allwright*, 321 U.S. 649 (1944). Also see *Hampton v. City of Jacksonville*, 304 F.2d 320 (C.A. 5, 1962); *Farmer v. Moses*, 232 F.Supp. 154 (S.D.N.Y., 1964) (state fair); *Baldwin v. Morgan*, 287 F.2d 750 (C.A. 5, 1961); *McQueen v. Drucker*, 438 F.2d 781 (C.A. 1, 1971) (public housing); *Meredith v. Allen County War Memorial Hospital Commission*, 397 F.2d 33 (C.A. 6, 1968) (hospital); and *Smith v. Holiday Inns of America*, 336 F.2d 630 (C.A. 6, 1964) (hotel).

state action is similarly compelled in the instant case, where the Respondent is under a statutory obligation to furnish a service which is necessary to life.[18] In performing this and other public functions,[19] Metropolitan Edison thus acts under color of state law.

[18]The performance of a public function in supplying necessary utility services was found to be an important index for a finding of state action in *Bronson v. Consolidated Edison of New York*, supra; *Stanford v. Gas Service Co.*, supra; *Davis v. Weir*, supra; *Palmer v. Columbia Gas of Ohio*, supra; and *Ihrke v. Northern States Power Co.*, supra.

[19] In addition to the performance of a public function in supplying utility service, the Respondent has also been authorized by the state to perform a governmental function in the adjudication of when private property is to be seized; and then itself is permitted to carry out that seizure and state sanctioned deprivation of property. Thus, courts have often held that statutorily authorized actions by a private person, resulting in the seizure or deprivation of property interests, which action possesses the characteristics of an act by the State, constitutes state action. Such action may take the form of entry onto private property, as the summary seizure of tenants' property by landlord: *Hall v. Garson*, 430 F.2d 430 (C.A. 5, 1970); *Dielen v. Levine*, 344 F.Supp. 823 (D., Neb., 1972); *Gross v. Fox*, 349 F.Supp. 1164 (E.D., Pa., 1972); or summary seizure of property by an innkeeper: *Klim v. Jones*, 315 F.Supp. 109 (N.D., Cal., 1970); or detention of an automobile by a garageman: *Hernandez v. European Auto Collision, Inc.*, 487 F.2d 378 (C.A. 2, 1973); *Mason v. Garris*, 360 F.Supp. 420 (N.D., Ga., 1973), or service of court process by private persons: *United States v. Wiseman*, 445 F.2d 792 (C.A. 2, 1971); or the arrest of persons by a bail bondsman: *Hill v. Toll*, 320 F.Supp. 185 (E.D., Pa., 1970). Hence, it is the delegation by the state to a private party of the decision making process to carry out the seizure of the property of another, following a contractual dispute, that has resulted in a finding of action under color of law. *Fuentes v. Shevin*, 407 U.S. 67 (1972). Thus, when a private party is

3. *Respondent acts in joint participation with the state, under extensive state regulation, in pursuing mutual goals under a statutory obligation to furnish "reasonably continuous" electrical services, from which mutual benefits are derived.*

Since both the Respondent and the Commonwealth of Pennsylvania have the mutual goals and mutual obligations of furnishing "reasonably continuous" utility services at a fair price to the utility customers, 66 Pa. Stat. Anno. §§1141, 1171, it is submitted that the Commonwealth of Pennsylvania is no less involved in Metropolitan Edison's activities than was the State of Delaware, when it was held to be a joint participant for state action purposes in the restaurant business in *Burton v. Wilmington Parking Authority*, 365 U.S. at 724.[20]

In pursuing their mutual goals, it is also apparent that the Commonwealth of Pennsylvania is "significantly involved" in every aspect of Metropolitan Edison's operations and activities. The Commonwealth of Pennsylvania, through its Public Utility Commission,

enabled by the state to deprive others of due process of law, a finding of state action is compelled, since the state has provided that method for resolution of such disputes. *Boddie v. Connecticut*, 401 U.S. 371 (1971).

[20]In determining whether state action existed based in part upon joint participation in a particular activity, this Court has noted that the actor need not be an "officer" of the state, since it is enough if he is a "willful participant" with the state. *United States v. Price*, 383 U.S. 787 (1966) at 794. Furthermore, the involvement of the state need not be "either exclusive or direct", since state action can be found even though the participation of the state is "peripheral" or its action is only one of "several cooperative forces" resulting in the constitutional violations. *United States v. Guest*, 383 U.S. 745 (1966).

extensively regulates and controls Metropolitan Edison by first granting it a "certificate of public convenience" in order for it to operate. 66 Pa. Stat. Anno. §§1121-1123. The Commission further controls the setting of rates by all utilities. *Id*, §1141. Every public utility must file its tariffs with the Commission. *Id*, §1142. Furthermore, no public utility may subject any customer to any "unreasonable prejudice or disadvantage" as to rates, *Id*, §1144. Of major importance is the fact that the Commission has complete power over the character of utility facilities and the furnishing of service by the utilities. *Id*, §1171. In addition, no public utility may subject any customer to any unreasonable prejudice or disadvantage in the furnishing of service. *Id*, §1172, and the Commission may further require reasonable standards for service. *Id*, §1182, upon its own motion or upon any complaint of "unreasonable, unsafe, inadequate, insufficient or unreasonably discriminatory" service. 66 Pa. Stat. Anno. §1183.[21]

The Commission has general administrative power and authority to "supervise and regulate" all public utilities doing business within the Commonwealth. 66

[21] In addition to its regulatory control over rates and services, the Commission has extensive regulatory and supervisory powers over utility operations, accounting and budgetary matters, 66 Pa. Stat. Anno. §1211, and, at all times has access to and may inspect and examine all utility accounts, books, maps, inventories, appraisals, valuations or other reports, documents and memoranda, and may require the filing of such material with the Commission. *Id*, §1217. The Commission also has supervision over utility securities and obligations. *Id*, §1241, and additionally has power to control a utility's relations with affiliated interests. *Id*, §§1271, 1276.

Pa. Stat. Anno. §1342.[22] In fact, the Commission's relationship with and control over utility companies is strikingly similar to that of a principal and agent relationship.[23]

It is apparent from the above that Metropolitan Edison is not a typical private business entity, since, in addition to state licensing, every significant aspect of its operation is subject to comprehensive statutory and administrative regulation. This comprehensive regulatory scheme demonstrates the complete involvement of the state in and its joint participation with the Respondent

[22] In this regard, it is interesting to note that the Court's finding of state action in *Stanford v. Gas Service Co.*, 346 F.Supp. at 721, was based primarily on the fact the utility was subject to extensive regulatory control, based on a Kansas statute, pursuant to which the utility terminated its customer's service. That statute was very similar to Section 1341 above, and provided:

> "Power, Authority and Jurisdiction. The state corporation commission is given full power, authority and jurisdiction to supervise and control the public utilities . . . and is empowered to do all things necessary and convenient for the exercise of such power, authority and jurisdiction." K.S.A. §66-101.

[23] The Commission is further vested with the power to enforce all of the provisions of the Act, including the "full intent thereof", and to "rescind" or "modify" any regulations or orders. 66 Pa. Stat. Anno. §1342. The filing of reports may be required of utilities. Id, §1345, and they are likewise required to observe and obey all regulations and orders of the Commission. Id, §1347. Further, the Commission is empowered to "vary, reform or revise" the terms of any contract entered into by utilities which concerns the "public interest and the general well being" of the Commonwealth. Id, §1360. Finally, the Commission is empowered to hear, investigate and resolve all complaints on behalf of or against any public utility in violation of any law which the Commission has jurisdiction to administer. Id, §§1391, 1395, 1398.

in the supplying of electrical services.[24] The Pennsylvania regulatory scheme thus goes far beyond the simple notice filing requirement which was found insufficient for state action purposes in *Kadlec v. Illinois Bell Telephone Company*, 407 F.2d 624 (C.A. 7, 1969) cert. den. 396 U.S. 846 (1969).[25]

In addition to the partnership role of the Respondent and the state in the furnishing of essential electrical services, mutual benefits are conferred upon these joint venturers through the provision of such services. Similarly, the finding of state action through joint participation in *Burton v. Wilmington Parking Authority*, supra, was based in part upon the fact that benefits were mutually conferred upon the state and the private entity in furnishing of the challenged service.

Metropolitan Edison receives distinct benefits from this arrangement since it is granted a certificate of convenience or franchise, and monopoly from the state. 66 Pa. Stat. Anno. §1121, in an exclusive territory of service. *Id*, §1121, with a guaranteed fair rate of return, *Id*, §§1141, 1171; *City of Pittsburgh v. Pa. P.U.C.*, 182 Pa. Super. 551, 128 A.2d 372 (1957), and is further vested with the right of eminent domain, *Id*,

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[24]While the concept of "pervasive state regulation" was not deemed to itself constitute the major indicia of state action by this Court in *Public Utilities Commission v. Pollak*, 343 U.S. 451 (1952) and in *Moose Lodge 107 v. Irvis*, 407 U.S. 163 (1972), yet its significance apparently cannot be underestimated in light of this Court's statement in *Columbia Broadcasting System v. Democratic National Committee*, 36 L.Ed.2d 772 (1973) at 793 that Congress did not establish a regulatory scheme for broadcast licensees "as pervasive as the regulation of public transportation in *Pollak*."

[25]If the utility company is to be given extensive powers in conjunction with its public responsibilities, it must be remembered that "Along with power, goes responsibility," and thus, when the actor's authority is derived in part from the "Government's thumb on the scales", the exercise of such authority and power becomes "closely akin to its exercise by the Government itself." *American Communications Ass'n v. Douds*, 339 U.S. 382 (1950).

§1124, and the right of entry onto customers' private property for the purpose of maintenance and operation of its equipment, Pa. P.U.C. Electric Regulation, Rule 14D. Finally, the Respondent is authorized by statute to promulgate its own regulations which have the effect of law, *Cray v. Pa. Greyhound Lines*, 177 Pa. Super. 275, 110 A.2d 892 (1955), and which are subject only to the restraints of state laws. *Id.* §1171.

Likewise, certain substantial benefits are conferred upon the Commonwealth of Pennsylvania, through the furnishing of utility service by the Respondent. The state is assured that its citizens will receive reasonably continuous and necessary utility services at reasonable prices through provision of such services by public utility companies. Furthermore, the state has an interest in seeing to it that its citizens receive such services at the lowest possible rate, while still yielding a fair rate of return to the utility. Furthermore, the control of rates to the public is another major benefit derived by the state from utility regulation. Since relatively unfettered terminations reduce the utility's operating costs, and since this reduction would be reflected in lower rates, the termination of services serves to further the state's regulatory interests.[26] The state thereby

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[26]See, Note: "Fourteenth Amendment Due Process in Terminations of Utility Services for Nonpayment," 86 Harvard L.Rev. 1477 (1973).

ironically receives a direct pecuniary benefit from the specific act complained of.

In addition, since the utility is a monopoly, its threat of termination for nonpayment of a bill has a tremendously coercive impact and often results in immediate payment of many disputed bills. Since the threatened terminations can result in an increase of revenue, and since the state receives a share of the utility's gross revenues, pursuant to 72 Pa. Stat. Anno. §8101, such threatened terminations result in a direct benefit to the state.[27]

Finally, it is apparent that the Commonwealth of Pennsylvania has a direct financial interest in the revenue of the Respondent. Although the Respondent corporation pays corporate net income tax and capital or franchise tax and property taxes, as do other Pennsylvania corporations, it also pays an additional and unique tax, i.e., the Utilities Gross Receipts Tax, 72 Pa. Stat. Anno. §8101, et seq. Every public utility, including Respondent, must pay to the Commonwealth of Pennsylvania, a tax of forty-five mills upon each dollar of its gross receipts from the sale of its utility services, including electricity. 72 Pa. Stat. Anno. §8101. It is submitted that the Utilities Gross Receipts Tax is no different than the five percent of gross profits paid to the City of St. Paul by the Northern States Power company in *Ihrke v. Northern States Power Co.*, supra. As in *Ihrke*, such an "arrangement" makes the state a "direct beneficiary" of the utility's business, especially since the state had the power to set the

[27]This rationale was specifically adopted by the Eighth Circuit as a basis for its finding of state action in *Ihrke v. Northern States Power Co.*, supra, 459 F.2d at 568.

utility's rates and to regulate its operations. *Ihrke*, supra, 459 F.2d at 570.[28]

Therefore, whether or not the Respondent intended to be a "partner" in furnishing utility services with the Commonwealth, is immaterial. It is sufficient for state action purposes that the two entities operate in a "symbiotic relationship", *Moose Lodge 107 v. Irvis*, 407 U.S. at 166, in the provision of such services.[29]

B. The Commonwealth of Pennsylvania is directly involved in the Respondent's termination activities in that it has specifically authorized, encouraged and approved such activities, and it has delegated its statutory obligation to the Respondent to determine the lawfulness of its own challenged termination practices.

1. *The Commonwealth of Pennsylvania has specifically authorized and approved the Respondent's termination action.*

A finding of state action is compelled when the state regulatory agency specifically approves the utility's

[28]See also *Hattell v. Public Service Co. of Colorado*, 350 F.Supp. 240 (D., Colo., 1972); *Buffington v. Gas Service Co.*, -F.Supp.- (W.D., Mo., W.D. 1973); *Salisbury v. New England Tel. and Tel. Col*, 2 Poverty Law Rep. §18546 (D., Conn., 1973) where the states derived specific monetary benefits from the utility's activities.

[29]States have been found to be joint participants for state action purposes in other utility termination cases. See *Buffington v. Gas Service Co.* - F.Supp. - (W.D., Mo., W.D., 1973) (City of Kansas shared "directly and proportionately" in the gross revenue of the defendant utility); *Bronson v. Consolidated Edison of New York*, 350 F.Supp. at 446 (the "utility is licensed to and does act as an agent of the state"); *Palmer v. Columbia Gas of Ohio*, 479 F.2d at 165 ("the regulatory activities of the state have insinuated it into a position of interdependence with the company so that it must be recognized as a joint participant with the company"). Also see *Ihrke v. Northern States Power Co.*, 459 F.2d at 569.

challenged conduct. *Public Utilities Commission v. Pollak*, 343 U.S. 451 (1952).

The Court of Appeals held that Metropolitan Edison's termination procedure is merely the product of internal corporate action without acquiescence of or authorization by the Commonwealth of Pennsylvania.[30]

However, Tariff Reg. No. VIII, is not the only state regulation to be considered here, for the Court has overlooked specific statutory authorization for the challenged practice. The Public Utility Code, 66 Pa. Stat. Anno. §1171 states *inter alia*:

> "Subject to the provisions of this act and the regulations or orders of the [Public Utility] Commission, every public utility may have *reasonable* rules and regulations governing the conditions under which it shall be required to render service . . ." (emphasis added).

Together with filing requirements of Tariff Reg. No. VIII, this statute subjects utility regulations governing conditions of service and termination to the regulatory authority of the Public Utility Commission. It requires the utility to adopt regulations acceptable to and to be approved by the Commission. It mandates a statutory standard of reasonableness. It subjects the corporation's regulations to the enforcement and compliance authority of the Commission. 66 Pa. Stat. Anno. §§1341, 1342, 1343, 1347.

Pursuant to Section 1171, Metropolitan Edison has promulgated Electric Tariff No. 41 which provides

[30]The only state involvement found by the court was Public Utility Commission regulation, Tariff Reg. No. VIII, which requires utility corporations to set forth the conditions of service termination for non-payment of accounts. This requirement, the court ruled, is not sufficient state involvement to satisfy the state action requirement. 483 F.2d at 758 (A-85).

unchecked authority to terminate utility service for alleged nonpayment of a bill. This tariff has been formally presented to the Public Utility Commission under its requirements governing submission of proposed tariffs. Tariff Reg. No. II. It has been accepted and approved by the Commission under its general regulatory authority. 66 Pa. Stat. Anno. §§1341, 1348. In the absence of Commission disapproval, the Public Utility Law provides that tariffs filed with the Commission will automatically become effective, upon notice, sixty days after filing. 66 Pa. Stat. Anno. §1348; Pa. P.U.C. Tariff Regulations, Section II, "Public Notice of Tariff Changes". In the instant case, Metropolitan Edison filed its termination tariff on April 30, 1971, and it became effective on June 30, 1971. Metropolitan Edison Company Electric Tariff, Electric Pa. P.U.C. No. 41, Rule 15.

It is evident that Section 1171 directly and significantly involves the Commonwealth with the challenged practices. The statutory provision goes far beyond the simple notice-filing requirement of Tariff Reg. No. VIII, cited by the Circuit Court. The Public Utility Commission is to define the standard of reasonableness; it is to review proposed regulations; it is to accept or reject those regulations. And having required, reviewed, accepted, and approved the challenged tariff, the Commission has vested Tariff No. 41 with the apparent authority of the Commonwealth and clothed the termination practice with the legitimacy of law. In short, the state has directly approved Metropolitan Edison's exercise of the tariff provisions. *Public Utilities Commission v. Pollak*, 343 U.S. at 462.

Moreover, Tariff No. 41 carries the force and effect of law. *Cray v. Pa. Greyhound Lines*, 177 Pa. Super. 275, 110 A.2d 892 (1955). Having been submitted,

received and approved by the Commission, the tariff is clothed with an authority which could not otherwise be enforced.[31] Therefore, Metropolitan Edison's tariff is no less an index of specific authorization than was the termination statute in *Palmer v. Columbia Gas of Ohio*, 479 F.2d at 162.

The fact that the Commission may not have held formal hearings to approve or ratify the Respondent's tariff is not material in view of the fact that such tariff was submitted as required by law and was not disapproved,[32] even though the Commission had the power to do so.[33] If Respondent's tariff did not carry

[31]Significantly, although there was no statutory or regulatory authorization in *Ihrke v. Northern States Power Co.*, 459 F.2d at 570, the court found specific municipal authorization for such activity by the fact that the city had a right to "review and revise" all of the company's proposed regulations.

[32]The Commission's silence on the matter constitutes its consent. Hence, in *Washington Gas Light Co. v. Virginia Electric and Power Co.*, the court stated that:

> "The argument [lack of investigation or formal approval] is not without merit, but the conclusion is not inevitable unless one equates administrative silence with abandonment of administrative duty. It is just as sensible to infer that silence means consent, i.e., approval. Indeed the latter inference seems the more likely one when we remember that even the gas company concedes that the S.C.C. possessed adequate regulatory power to stop V.E.P.C.O. if it chose to do so . . ." 438 F.2d at 252.

[33]Since the Commission had the "right to control" the Respondent's challenged activity, its failure to exercise such power is immaterial for a finding of state action. *Pendrell v. Chatham College*, 42 L.W. 2429 (W.D., Pa., 1974). Such reservation of the power to control operations was specifically noted by the court in *Palmer*, supra, 479 F.2d at 164, as an important index of state action. Significantly, although no statutory or regulatory authorization for termination existed in *Ihrke v. Northern States Power Co.*, supra, 459 F.2d at 570, the court found specific municipal authorization of such activity in

the approval and authority of the Commission, it would have no force and effect and could not serve as justificiation for Metropolitan Edison's termination practices.[34]

2. *The Commonwealth of Pennsylvania has specifically encouraged the Respondent's termination practices.*

In *Reitman v. Mulkey*, 387 U.S. 369, 386 (1967), this Court concluded that prohibited state involvement could be found even where the state can be charged with only "encouraging", rather than "commanding" diiscrimination. Thus, where the offending party can legitimately rely on a state statute which authorizes or permits the challenged conduct, whether or not such conduct could, have been engaged in prior to enactment off the statute, a finding of action under color of law is justified. See *Railway Employees Department v. Hanson*, 351 U.S. 225 (1956); *McCabe v. Atchison Topeka & Santa Fe R. Co.*, 235 U.S. 151 (1914); *Nixon v. Condon*, 286 U.S. 73 (1932).

the fact that while the company had the right to prepare its own regulations, the City had the right to review and revise all of the company's regulations.

[34]Since Respondent operates solely under the authority of the Public Utility Law, 66 Pa. Stat. Anno. §1171 et seq, any argument that utilities could lawfully terminate services arbitrarily at common law is irrelevant and must be rejected. *Palmer v. Columbia Gas Co. of Ohio*, 479 F.2d at 162. Also see *Reitman v. Mulkey*, 387 U.S. 369 (1967); *New York Times v. Sullivan*, 376 U.S. 245 (1964). Furthermore, any such historically state sanctioned activity would in itself be considered state action since it was undertaken pursuant to state "custom or usage" within the purview of 42 U.S.C. §1983. See *Adickes v. S.H.Kress Co.*, 398 U.S. 144 (1970).

In addition to Commission approval of Metropolitan Edison's termination practices, the Pennsylvania statutory and regulatory scheme also encourages such termination action. The Legislature has thus provided that there be prior Commission approval, including a finding of "compliance with existing laws", for a variety of utility actions, including abandonment or termination of services. 66 Pa. Stat. Anno. §1122. However, at the same time, the Legislature also specifically exempted termination for nonpayment of a bill from the requirement of obtaining prior Commission approval and finding of compliance with the law, needed for almost all other utility company activities. *Id*, §1122(d).

In further encouragement of Respondent's termination practices, the Commission has promulgated several regulations regarding entry on private property and discontinuance of service. Thus, Pa. P.U.C. Electric Regulations, Rule 14D provides that utility personnel may have access to meters and equipment located in customers' premises. In addition, Pa. P.U.C. Tariff Regulations, Section VIII, provides that all public utilities that "impose penalties upon its customers for failure to pay bills promptly shall provide in its posted and filed tariffs a rule setting forth clearly the circumstances and conditions in which the penalties are imposed . . ." Accordingly, the Respondent filed its tariff regarding termination of service with the Commission, as Metropolitan Edison Company Electric Tariff, Electric Pa. P.U.C. No. 41, Rule 15, pursuant to which it terminated Petitioner's electrical service.[35]

[35]Courts have found state action where public utilities were directly encouraged or authorized by state statutory or regulatory schemes to terminate utility services for nonpayment of bills. See *Bronson v. Consolidated Edison Co. of New York, Inc.*, supra; *Buffington v. Gas Service Co.*, supra; *Stanford v. Gas Service Co.*, supra.

Thus, the state has specifically "fostered and encouraged" the activity challenged herein.

In addition to the specific authorization for and encouragement of Respondent's practice challenged above, the Commonwealth has lent further affirmative support to Respondent's activity by assuring Respondent a monopoly in the provision of such services, thereby providing a further disincentive to Respondent to refrain from terminating services for nonpayment of a disputed bill.

3. *The Commonwealth of Pennsylvania has delegated to Respondent the Public Utility Commission's statutory responsibility to assure that customers are not arbitrarily and unlawfully deprived of "reasonably continuous" electrical services.*

The Commission has the duty to see to it that utility customers receive reasonably continuous service, without unreasonable interruptions or delay, 66 Pa. Stat. Anno. §§1171, 1182, 1183, 1341, as part of its primary obligation of protecting the rights and interests of the public. However, both the Legislature and the Commission have delegated such responsibility, by promulgation of Tariff VIII, and Section 1122, 66 Pa. Stat. Anno. §1122, and have thereby transferred such responsibility to the Respondent.

Not only has the Commission delegated its statutory responsibility, but it has also specifically refused to promulgate additional rules and regulations regarding utility company collection and termination practices.[36]

[36]The petitions of several low income consumers (including that of the Petitioner) filed with the Commission, requesting statewide rule making hearings on the issue of whether opportunity for a prior hearing should be required prior to termination of services for nonpayment of a disputed bill, were recently dismissed by the Commission on March 20, 1974, at Complaint Docket No. C.20089.

By thus approving the Respondent's termination of service tariff, the Commission has authorized the Respondent to determine the reasonableness of its own termination actions. Such abdication of responsibility cannot conceivably be in furtherance of the Commission's duty to "protect the public". *Citizens Water Co. of Washington, Pa. v. Pa. P.U.C.*, 181 Pa. Super 301, 124 A.2d 123 (1956).

It is submitted that the situation in the instant case is very similar to the situation in *Boman v. Birmingham Transit Co.*, supra. It was held by the Fifth Circuit therein that:

> "Where, as here, the City delegated to its franchise holder power to make rules for seating of passengers and made the violation of such rules criminal . . . we conclude that the Bus Company to that extent became an agent for the State, and its actions in promulgating and enforcing the rule constitutes a denial of the Plaintiff's constitutional rights." Id, 280 F.2d at 535.[37]

This Court has held that state "inaction" may be a significant indicia of state action. Hence, in *Burton v. Wilmington Parking Authority*, supra, this Court noted that:

> ". . . the Authority could have affirmatively required Eagle to discharge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise as a consequence of state participation. But no state may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be . . . By its inaction the Authority, and through it the state, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination." 365 U.S. at 725.

[37] It is apparent that the sole distinction between the instant case and *Boman* is that the Respondent's termination rule is not enforceable by criminal sanctions. However, Petitioner submits that this is, in effect, a distinction without a difference, since the consequences of her failing to pay Respondent's bill resulted in a penalty to her that was at least as severe as that of a conviction for breach of the peace. Property rights are no less deserving of constitutional protections than are personal rights. *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972).

Similarly, in failing to impose due process requirements on Metropolitan Edison's tariffs the state has effectively abdicated its responsibility in this area.[38] See *Fuentes v. Shevin*, 407 U.S. 67, 93 (1972) in this regard.

In conclusion, whether the above state action theories are applied separately or cumulatively to Metropolitan Edison, they show a picture of state involvement that has a significant effect on a customer's relations with a public utility. Mrs. Jackson and her family were in no position to bargain with Metropolitan Edison for a delay or reconsideration in the termination decision; they could seek electricity from no one else in their area when their service was terminated. The utility's regulations, which have the effect of law, and which were approved by the Commission, provided her in theory with nothing more than some notice. When no such notice was provided to Petitioner, she had no redress. The state had specifically exempted from the

[38] In this regard, it may be noted that state action, based in part upon state "inaction" was found in other utility termination cases. For example, see *Bronson v. Consolidated Edison of New York, Inc.*, 350 F.Supp. at 447, where the court noted that the statute authorizing termination of service did not go "far enough", since it failed to also provide for due process protections.

requirement of prior Commission approval, the termination of service for nonpayment of bills. Finally, the company was legally empowered to enter Mrs. Jackson's home to shut-off electricity at her meter. The end result is a denial of fundamental fairness to Mrs. Jackson and to other utility customers, and both Metropolitan Edison and the state must jointly bear a direct responsibility for this result.

DUE PROCESS OF LAW REQUIRES THAT BEFORE PETITIONER'S ESSENTIAL UTILITY SERVICES MAY BE TERMINATED, PETITIONER MUST BE PROVIDED WITH ADEQUATE PRIOR NOTICE AND OPPORTUNITY TO BE HEARD.

A. Due process of law is necessary in order to prevent the arbitrary and erroneous deprivation of a statutorily conferred entitlement or property right essential to life and health.

This Court has repeatedly reaffirmed the principle that, "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy the right they must first be notified." *Baldwin v. Hale*, 68 U.S. 223, 233 (1863), as cited in *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). Additionally, for those rights to be effective they "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). A deprivation of a property interest or entitlement requires that the opportunity to be heard and to contest the deprivation be provided before the loss of the property or benefit. *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Bell v. Burson*, 402 U.S. 535 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Boddie v. Connecticut*, 401 U.S. 371 (1971).

The Pennsylvania Public Utility Law, by mandating that "reasonably continuous" utility service be provided on a non-discriminatory basis, 66 Pa. Stat. Anno. §§1171, 1144, confers by statute a benefit or entitlement to utility customers no less important, than other property interests or personal rights heretofore afforded due process protection by this Court. *Fuentes v. Shevin*, supra, (household goods); *Bell v. Burson*, supra (driver's license); *Goldberg v. Kelly*, supra (welfare benefits).[39] See also *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972).

Electricity services, as with other utility services, have been described by this Court and lower courts as "necessities of life".[40] One lower federal court, in explaining the greater threat to life and health that arises from termination of heat or electricity as compared with the termination of welfare benefits considered in *Goldberg v. Kelly*, observed that "A person can freeze to death or die of pneumonia much more quickly than he can starve to death."[41] This

[39] The great majority of lower courts considering the issue have held that utility customers possess a constitutionally protected interest not to have their utility service arbitrarily terminated. *See, e.g., Palmer v. Columbia Gas Co.*, 342 F.Supp. 241, 244 (N.D., Ohio, 1972) aff'd, 479 F.2d 153 (6th Cir., 1973); *Bronson v. Consolidated Edison Co.*, 350 F.Supp. at 447; *Stanford v. Gas Service Co.* 346 F.Supp. 717, 719-21 (D.Kan. 1972); *Lamb v. Hamblin*, Util. L.Rep. (State) §21, 850 (D., Minn., Nov. 30, 1972); *Davis v. Weir*, 328 F.Supp. 317, 321-22 (N.D., Ga., 1971); *cf. Lucas v. Wisconsin Electric Power Co.*, 438 F.2d 248, 646 n. 13 (7th Cir., 1972) *cert. den.* 409 U.S. 1114 (1973).

[40] *Moose Lodge 107 v. Irvis*, 407 U.S. 163, 173 (1972); *Jones v. City of Portland*, 245 U.S. 217, 223 (1917); *Stanford v. Gas Service Co.*, supra, 346 F.Supp. at 720; *Davis v. Weir*, supra, 328 F.Supp. at 321; *Bronson v. Consolidated Edison Co. of New York, Inc.*, 350 F.Supp. at 447. Also see *infra*, pp. 16-17.

[41] *Palmer v. Columbia Gas Co. of Ohio*, 342 F.Supp. 241, 244 (N.D., Ohio, 1972), aff'd. 479 F.2d 153.

observation became a tragic reality this year when the media reported the deaths of utility customers whose services were summarily terminated.[42] Such utility terminations most often cause their greatest hardship on the poor and elderly.[43] See *Palmer v. Columbia Gas of Ohio*, supra, 479 F.2d at 169; Shelton, "The Shutoff of Utility Services for Non-payment: A Plight of the Poor," 46 Washington L.Rev. 745 (1971); Note, "Public Utilities and the Poor", 78 Yale L.J. 448 (1969).[44]

Certainly the facts in this case show the suffering experienced by a low income mother living alone with two minor children all of whom had to live in their home for eight days and nights without lighting, adequate heat, or hot water for cooking or hygienic purposes. The temporary judicial relief obtained may well have prevented the colds experienced by the two children in this period from becoming more serious threats to their health.

The current situation involving unfettered termination power leads to erroneous terminations and constitutes an additional reason to apply due process protections in utility termination situations. Thus, one federal court was moved to comment on the "Orwellian nightmare of computer control which breaks down

[42] "Elderly Couple Found Frozen in Syracuse Home", *The New York Times*, Dec. 26, 1973 (electricity termination making gas furnace inoperative); "Man, Seventy-one, Freezes to Death After Utility Shuts Off Gas", *Boston Globe*, p. 17 (Feb. 9, 1974); "Tragedies: A Winter's Tale", *Newsweek*, p. 28 (Jan. 8, 1974).

[43] See also Amicus Brief of the National Consumer Law Center.

[44] The casual observation of the Court of Appeals that there is no "threat" to life from utility termination is thus contradicted by real events. (A-88).

through mechanical and programmers' failures and errors."[45]

The monopoly nature of the utility service further gives little incentive to qualify the unrestricted use of the termination power in order to be competitive or to retain good will from such customers. See Note, 86 Harv. L.Rev. at 1477. Abuse of the termination power is common with utility employees evoking a "shockingly callous and impersonal attitude" toward customers.[46] The irresponsible conduct of the Metropolitan Edison representative in this case is apparent when he indicated to Mrs. Jackson that a $30.00 payment would be required and would be accepted four days later, and, instead of returning to collect it, sent or allowed other company representatives to come and cut-off the electricity on that day.

Arbitrariness and unfairness further results from questionable billing practices and erroneous terminations despite full payment of the bill. See Note, 48 N.Y.U. L.Rev. supra at 515. Further, the unequal bargaining position of the consumer, particularly the low income consumer, makes it unlikely for him or her either to be familiar with or able to afford litigation remedies for a utility dispute.[47] cf., *Fuentes v. Shevin*,

[45] *Bronson v. Consolidated Edison Co. of New York*, supra, 350 F.Supp. at 444.

[46] *Palmer v. Columbia Gas of Ohio*, supra, 342 F.Supp. at 243, aff'd 479 F.2d 153. An employee's response to a customer who claimed he paid a bill was "Tough. Pay the bill again." 479 F.2d at 158. Another advised a cut-off victim, "Run around to keep warm." *Id.* at 168.

[47] *Palmer v. Columbia Gas of Ohio*, 479 F.2d at 748-52. Other limitations on tort remedies include the delay and burdensomeness to a customer who would pay an unjust bill to avoid loss of service and expenses of litigation. See Note, 86 Harv. L.Rev. at 1477, n. 26.

407 U.S. at 83 n. 13 (1972). Finally, customers often have valid defenses and bases for contesting bills for the above and other reasons.[48] Mrs. Jackson herself questioned, to no avail, whether she was legally liable for the utility services for which she claimed Dodson had contracted.

It is apparent that "unjust terminations exact a high personal and societal cost, as measured in demoralization and frustration, and are offensive to our society's basic notions of fairness."[49] It was this kind of frustration caused by a "lack of accessible and visible means of establishing the merits of grievances" that was highlighted as a key factor in the civil disorders of the 1960's.[50]

It is submitted that this Court's rationale for applying due process protection in *Goldberg v. Kelly*, is certainly as applicable to the case of utility terminations. Thus:

> "[T]he stakes are simply too high ... and the possibility for honest error or irritable misjudgment too great, to allow termination ... without giving ... the recipient a chance ... to be fully informed of the case against him so that he may contest its basis and produce evidence in rebuttal." 397 U.S. 254 at 266 (1970).

[48] Recognized customer claims and defenses which could be raised at prior hearings if the opportunity were provided include: overcharging mistakes and failure to record full payment of outstanding bills, *Bronson*, 350 F.Supp. at 445, supra, 342 F.Supp. at 243; inaccurate or inoperative meter, *Crews v. Jacksonville Elec. Authority*, Pov. L.Rep. §13,647 (Fla. Cir. Ct., 1971); inadequacy of service due to faulty utility equipment, *York Tel. and Tel. Co. v. Pa. P.U.C.*, 181 Pa. Super. 11, 121 A.2d 605 (1956); customer's refusal to pay debt of prior owner or tenant, *Tyrone Gas and Water Co. v. P.S.C.*, 77 Pa. Super. 292 (1921); denial of service to wife upon husband's refusal to pay his bill, *Southwestern Bell Tel. Co. v. Batesmar*, 266 S.W.2d 289 (Ark. 1954) See also *Shelton*, 46 Wash. L.Rev. at 763-64.

[49] Note, supra, 86 Harv. L.Rev. at 1482.

[50] See Report of the Nat'l Advisory Comm'n on Civil Disorders, 291 (1968). See also Amicus Brief of National Consumer Law Center, page 9, quote from "Mark Twain's Notebook."

B. Due process for utility termination situations requires adequate prior notice of the nature and means of resolution of the dispute, and an opportunity for an oral hearing, prior to the termination of essential utility services.

While "due process is perhaps the least frozen concept of our law", *Griffin v. Illinois*, 378 U.S. 1 (1958) (Frankfurter J. concurring), it is apparent that when "protected interests" are at stake, the right to some kind of prior hearing is required. *Perry v. Sindermann*, 408 U.S. 593 (1972); *Board of Regents v. Roth*, 408 U.S. 564, 569-70 (1972).

In this case, the Petitioner had a statutory entitlement to the continued receipt of electrical services to the extent that such services could not be terminated in the absence of due process of law. 66 Pa. Stat. Anno. §1171. In this regard, it has been held by this Court that property interests requiring constitutional protection "extend well beyond the actual ownership of real estate, chattels or money", *Roth, supra* at 572. They extend as well to "safeguard ... the security of interests that a person has acquired in specific benefits." *Id.* See also *California Department of Human Resources v. Java*, 402 U.S. 121 (1971); *Goldberg v. Kelly, supra.* Thus, to have a property interest in a benefit, a person must have a legitimate claim of entitlement to it. Since protection must be afforded to "those claims upon which people rely in their daily lives," such reliance must not be "arbitrarily under-

mined." *Roth*, supra at 576-577. It cannot be doubted in this case that Mrs. Jackson and her children were arbitrarily deprived of an entitlement upon which they relied as a necessity of life.

Due process requires minimally that prior notice be provided that is "reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections," *Grannis v. Ordean*, 234 U.S. 385 (1914); *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 314 (1950); *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972), at a hearing at a meaningful time and in a meaningful manner, *Armstrong v. Manzo*, 380 U.S. 545 (1965); *Boddie v. Connecticut*, 401 U.S. 371 (1971). Such hearing must take place before the utility customer is condemned to suffer a "grievous loss". *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concuring). No state interest is present herein which warrants a deprivation prior to the hearing. *Fuentes v. Shevin*, 407 U.S. 67 (1972). The grievous loss to the customer outweighs any competing state interest, as Mrs. Jackson and her children can readily affirm.

A utility customer must be given a notice sufficiently in advance to permit adequate opportunity to prepare for and be present at the hearing. *Muliane v. Central Hanover Bank and Trust Co.*, supra. The notice must provide the customer with the information he needs to quickly and intelligently take available steps to prevent the threatened termination of service. *Palmer*, 479 F.2d at 166; *Bronson*, 350 F.Supp. at 450. Thus, the customer should be advised of the possibility of resolution of the dispute by contacting a particular company representative. *Palmer, supra* at 166. Furthermore, the notice should advise of the right to either appeal to the state regulatory commission or to have a de novo formal or informal hearing before the regulatory commission. *Bronson*, supra at 449. Of course, the customer must be advised of the right to continued utility service in the event that the dispute resolution procedure is invoked. *Palmer*, supra, 166. While the reasonableness of any notice procedure must be considered in the light of the circumstances of each particular case, *Covey v. Town of Somers*, 351 U.S. 141 (1956), it is submitted that the above notice requirements are the very rudiments of a fair warning procedure.[51]

There is currently insufficient or no notice to the consumer before termination despite requirements of some notice. Notwithstanding Metropolitan Edison's tariff approved by the Commission, providing for "reasonable notice", no notice whatsoever was provided to Mrs. Jackson prior to or on the Monday she was expecting a company representative to receive a $30.00 payment; she made fruitless phone calls to company employees, even to the home of one of the employees, to protest and seek some redress. This case is illustrative of a pattern which has emerged from other federal utility termination cases.[52] In addition, this case and

[51] This Court has stressed the fact that particularly the uneducated, uninformed consumer cannot be presumed to know his legal rights or how to seek redress for them. *Fuentes v. Shevin*, 407 U.S. at 83 n.13.

[52] In *Palmer* "shut-offs [were] sometimes being made without warning . . . [W]hen the collectors went out to shut-off gas, they frequently did so without any announcement whatever to the consumer, even though the consumer was sitting right in his house, so that the first notice he would have of the shut-off was that his house got cold, or his kitchen range would not light . . ." 342 F.Supp. at 243. Ohio law requires 24 hours' notice before workmen could enter the home and disconnect the meter. Id. at 245. In *Davis v. Weir*, absolutely no notice was provided the consumer-tenant before water service was shut-off. 328 F.Supp. at 320.

others attest to the inadequacy of notice when and if it does come. Although Mrs. Jackson was told that money was owing she was never even presented with any bills or explanation why she, rather than Dodson, should pay the entire sum allegedly owing.[53] Nor was she warned that her electricity would be discontinued for failure to pay the bill.

Due process also requires an opportunity to be heard in a manner appropriate to the nature of the case. The hearing must naturally take place before an impartial third party. *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Goldberg v. Kelly*, 397 U.S. at 267-71. The burden of proof should be placed on the utility company to prove that the bill is due. *Wood v. City of Auburn*, 87 Me. at 293. In addition, the utility customer must be permitted to examine the company's records in advance, cross examine adverse witnesses and present his or her own case, with the assistance of a representative, if necessary. *Goldberg v. Kelly*, supra, at 267-271.

The experience with utilities has shown that their shut-off and complaint procedures are grossly inadequate with "unresponsiveness or 'runarounds' the only answer to [the customer's] inquiries." *Bronson*, supra, 350 F. Supp. at 448.[54] No hearings are provided and

[53] In *Bronson* the consumer merely received a 3" x 8" slip of paper with a bare one sentence "we are sorry" notice that the court found constitutionally inadequate. 350 F.Supp. at 450. See also *Palmer*, supra, 342 F.Supp. at 242-44.

[54] See also, *e.g.*, *Palmer v. Columbia Gas Co.*, 342 F.Supp. at 243-44; Note, supra, 48 N.Y.U. L.Rev. supra, at 517.

recourse to regulatory commissions for hearings have been generally fruitless.[55] In addition, the alternative of "pay first and litigate later" as sanctioned by the Court of Appeals at (A-91) is simply a "non-alternative"[56] *Bronson v. Consolidated Edison Co. of New York*, 350 F. Supp. at 449, for poor persons. Recourse to other formal or informal remedies are equally inadequate.[57]

It should be noted that a formal adjudicatory hearing, which the state regulatory agency could schedule and conduct, need not be the first or sole method of dispute resolution. Utilities may wish to establish complaint bureaus, under state regulation, before formal hearings are scheduled. These proceedings will undoubtedly lead to the prompt and low-cost resolution of most termination disputes, leaving the more protracted or complex disputes for the formal adjudicatory hearing. The experience in New York State, where the dual conference-type hearing and

[55] The Petitioner herself filed a complaint with the Pa. Public Utility Commission to seek rulemaking hearings to establish rules for hearings prior to termination of service but the complaint, deemed a petition, was summarily dismissed. See footnote No. 36 supra.

[56] See Shelton, "The Shutoff of Utility Services for Nonpayment: A Plight of the Poor." 46 Wash. L.Rev. 745, 748-52 (1971). The Third Circuit's reference below to small claims courts 438 F.2d at 760 n. 11. entirely ignores the fact that these bodies have no equity powers and cannot restore terminated service, and further, that consumers are never given notice and do not otherwise know that these bodies exist to deal post-facto with billing disputes. See also *Fuentes v. Shevin*, 407 U.S. 67, 83, n. 13 (1972).

[57] See contra, *Lucas v. Wisconsin Electric Power Co.*, 466 F.2d at 649, where the court held that adequate administrative remedies in fact existed in that case.

formal evidentiary-type hearing system utilizing impartial Public Service Commission officers has been in use for some time, concretely demonstrates the workability and effectiveness of the due process procedures suggested above.[58]

The decision below relies heavily on the view that utility service is not so important as to warrant due process protection. This is refuted by this Court's decisions above protecting similar interests or property entitlements. *Board of Regents v. Roth*, 408 U.S. 564 (1972). This Court has further rejected as constitutionally deficient, the procedures allowing for the taking of property pending a final judgment and those allowing for posting of a bond or security to regain property. *Fuentes v. Shevin*, 407 U.S. at 72-73.

The Court below also accepted the premise that utility service could be arbitrarily or wrongfully terminated and the wrong remedied by full payment of the disputed bill followed by a claim for a refund, in court if necessary. 483 F.2d at 760-61. (A-89). Even assuming the validity of the assumption that claiming and suing for a refund are available remedies, this premise ignores the recent holding of this Court that:

> "[N]o later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. 'This Court has not embraced the general proposition that a wrong may be done if it can be undone.' *Stanley v. Illinois*, 405 U.S. 645, 647 . . ."

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[58] See Amicus Brief of the Public Service Comm'n of the State of New York; see also Note, supra, 86 Harv. L.Rev. at 1503.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court reverse the Judgment and Order of the Third Circuit Court of Appeals, and hold that Respondent did act under color of law in terminating Petitioner's electrical services without the adequate prior notice and opportunity to be heard required by due process of law. Petitioner requests that this case be remanded to the district court for a determination and further proceedings in accordance with the opinion herein.

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APPENDIX A

STATUTES, REGULATIONS AND TARIFFS

A. Pennsylvania Public Utility Code

Pennsylvania Statutes Annotated, Title 66, Sections:

a. §452. Commission established; terms of office; qualifications of members; chairman; compensation; quorum

(a) A commission to be known as the Pennsylvania Public Utility Commission is hereby created. The commission shall consist of five members who shall be appointed by the Governor, by and with the advice and consent of two-thirds of all the members of the Senate. The commissioners first appointed under this act, shall continue in office for terms of two, four, six, eight, and ten years, respectively, from the effective date of this act, but their successors shall each be appointed for a term of ten years. No commissioner, upon the expiration of his term as aforesaid, shall continue to hold office until his successor shall be duly appointed or shall be qualified. Each commissioner, at the time of his appointment and qualification, shall be a resident of the Commonwealth of Pennsylvania, and shall have been a qualified elector therein for a period of at least one year next preceeding his appointment, and shall also be not less than thirty years of age.

(b) A member designated by the Governor shall be the chairman of the commission during such member's term of office. When present, the chairman shall preside at all meetings, but in his absence a member, designated by the chairman, shall preside and shall exercise, for the time being, all the powers of the chairman.

(c) Each of the commissioners shall receive an annual salary of nineteen thousand dollars ($19,000.00), except the chairman, who shall receive an annual salary of twenty thousand dollars ($20,000.00).

(d) Three members of the commission shall constitute a quorum who, for all purposes, including the making of any order or the ratification of any act done or order made by one or more of the commissioners, must act unanimously. 1937, March 31, P.L. 160, §1; 1943, March 31, P.L. 32, §1; 1949, March 31, P.L. 369, No. 32, §1, 1957, July 16, P.L. 949, No. 408, §1.

b. §461. Powers and duties of commission.

The Pennsylvania Public Utility Commission shall exercise the powers and perform the duties exercised and performed prior to the effective date of this act by the Public Service Commission of the Commonwealth of Pennsylvania, and any powers and duties subsequently vested in and imposed upon the Pennsylvania Public Utility Commission by law. 1937, March 31, P.L. 160, §10.

c. §462. Additional powers and duties

The Pennsylvania Public Utility Commission shall have the power and its duties shall be -

(a) To administer and enforce the act, approved the twenty-eighth day of May, one thousand nine hundred thirty-seven (Pamphlet Laws, one thousand fifty-three), designated as the "Public Utility Law", as amended and supplemented, or any law hereafter enacted for the regulation of public utilities.

(b) To certify to the Department of Health any question of fact regarding the purity of water supplied to the public by any public service company or public utility over which it has jurisdiction, when any such question arises in any controversy or other proceeding before it, and upon the determination of such question by the Department of Health, to incorporate the findings of the board thereon in its decision upon the controversy or other proceeding out of which the question arose. 1937, March 31, P.L. 160, §11; 1941, July 8, P.L. 284, §1.

d. §1101 Short title

This act shall be known, and may be cited, as the "Public Utility Law". 1937, May 28, P.L. 1053, art. I, §1.

e. §1121 Organization of public utilities and beginning of service.

Upon the approval of the commission, evidenced by its certificate of public convenience first had and obtained, and not otherwise, it shall be lawful for any proposed public utility.

(a) To be incorporated, organized, or created: Provided, That existing laws relative to the incorporation, organization, and creation of such public utilities shall first have been complied with, prior to the application to the commission for its certificate of public convenience.

(b) To begin to offer, render, furnish, or supply service within this Commonwealth, 1937, May 28, P.L. 1053, art. II, §201. (emphasis added)

f. §1122. Enumeration of facts requiring certificate

Upon approval of the commission, evidenced by its certificate of public convenience first had and obtained, and upon compliance with existing laws, and not otherwise, it shall be lawful:

(a) For a foreign public utility to obtain the right to do business within this Commonwealth, if existing laws permit such foreign public utility to exercise its powers and franchises within this Commonwealth.

(b) For any public utility to renew its charter, or obtain any additional right, power, franchise, or privilege, by any amendment or supplement to its charter, or otherwise.

(c) For any public utility to begin the exercise of any additional right, power, franchise, or privilege.

(d) For any public utility to dissolve, or to abandon or surrender, in whole or in part, any service, right, power, franchise, or privilege: Provided, That the provisions of this paragraph shall not apply to discontinuance of service to a patron for nonpayment of a bill, or upon request of a patron. (emphasis added).

(e) For any public utility, except a common carrier by railroad subject to the Interstate Commerce Act, to acquire from, or to transfer to, any person or corporation, including a municipal corporation, by any method or device whatsoever, including a consolidation, merger, sale or lease, the title to, or the possession or use of, any tangible or intangible property used or useful in the public service: Provided, however, That such approval shall not be required - (1) if the undepreciated book value of the property to be acquired or transferred does not exceed one thousand dollars; or (2) if the undepreciated book value of the property to be acquired or transferred does not exceed the lesser of - (a) two per centum of the undepreciated book value of all of the fixed assets of such public utility, or (b) five thousand dollars in the case of personality or

fifty thousand dollars in the case of realty; or (3) if the property to be acquired is to be installed new as a part of or consumed in the operation of the used and useful property of such public utility; or (4) if the property to be transferred by such public utility is obsolete, worn out or otherwise unserviceable.

But exceptions (1), (2), (3), and (4) shall not be applicable, and approval of the commission evidenced by a certificate of public convenience shall be required, if any such acquisition or transfer of property involves a transfer of patrons.

(f) For any public utility to acquire five per centum or more of the voting capital stock of any corporation.

(g) For any municipal corporation to acquire, construct, or begin to operate any plant, equipment, or other facilities for the rendering or furnishing to the public of any public utility service beyond its corporate limits. 1937, May 28, P.L. 1053, art. II, §202; 1938, Sp. Sess., Sept. 28, P.L. 44, §1; 1939, June 19, P.L. 419, §1.

g. §1123 Procedure to obtain certificates of public convenience

(a) Every application for a certificate of public convenience shall be made to the commission, in writing, be verified by oath or affirmation, and be in such form, and contain such information, as the commission may require by its regulations. A certificate of public convenience shall be granted by order of the commission, only if and when the commission shall find or determine that the granting of such certificate is necessary or proper for the service accomodation, convenience, or safety of the public; and the commission in granting such certificate, may impose such conditions as it may deem to be just and reasonable. In every case, the commission shall make a finding or determination in writing, stating whether or not its approval is granted. Any holder of a certificate of public convenience, exercising the authority conferred by such certificate, shall be deemed to have waived any and all objections to the terms and conditions of such certificate.

(b) For the purpose of enabling the commission to make such finding or determination, it shall hold such hearings, which shall be public, and, before or after hearing, it may make such inquiries, physical examinations, valuations, and investigations, and may require such plans, specifications, and estimates of cost, as it may deem necessary or proper in enabling it to reach a finding or determination. 1937, May 28, P.L. 1053, art. II, §203. (emphasis added).

h. §1124. Certain appropriations by the right of eminent domain prohibited

Neither a proposed domestic public utility hereafter incorporated nor a foreign public utility hereafter authorized to do business in this Commonwealth shall exercise any power of eminent domain within this Commonwealth until it shall have received the certificate of public convenience required by section 201 of this act. 1937, May 28, P.L. 1053, art. II, §204, added, 1963, Aug. 28, P.L. 1225, §3.

i. §1141. Rates to be just and reasonable.

Every rate made, demanded, or received by any public utility, or by any two or more public utilities jointly, shall be just and reasonable, and in conformity with regulations or orders of the commission; Provided, That only public utility service being furnished or rendered by a municipal corporation, or by the operating agencies of any municipal corporation, beyond its corporate limits, shall be subject to regulation and control by the commission as to rates, with the same force, and in like

manner, as if such service were rendered by a public utility. 1937, May 28, P.L. 1053, art. III, §301; 1939, March 21, P.L. 10, No. 11, §2.

j. §1142. Tariffs; filing and inspection

Under such regulations as the commission may prescribe, every public utility shall file with the commission, within such time and in such form as the commission may designate, tariffs showing all rates established by it and collected or enforced, or to be collected or enforced, within the jurisdiction of the commission. The tariffs of any public utility also subject to the jurisdiction of a Federal regulatory body shall correspond, so far as practicable, to the form of those prescribed by such Federal regulatory body. Every public utility shall keep copies of such tariffs open to public inspection under such rules and regulations as the commission may prescribe. 1937, May 28, P.L. 1053, art. III, §302.

k. §1144. Discrimination in rates

No public utility shall, as to rates, make or grant any unreasonable preference or advantage to any person, corporation, or municipal corporation, or subject any person, corporation, or municipal corporation to any unreasonable prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates, either as between localities or as between classes of service. Unless specially authorized by the commission, no public utility shall make, demand, or receive any greater rate in the aggregate for the transportation of passengers or property of the same class, or for the transmission of any message or conversation for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or any greater rate as a through rate than the aggregate of the intermediate rates. Nothing herein contained shall be deemed to prohibit the establishment of reasonable zone or group systems, or classifications of rates or, in the case of common carriers, the issuance of excursion, commutation, or other special tickets, at special rates, or the granting of nontransferable free passes, or passes at a discount to any officer, employee, or pensioner of such common carrier. No rate charged by a municipality for any public utility service rendered or furnished beyond its corporate limits shall be considered unjustly discriminatory solely by reason of the fact that a different rate is charged for a similar service within its corporate limits. 1937, May 28, P.L. 1053, art. III, §304.

l. §1148. Voluntary changes in rates

(a) Unless the commission otherwise orders, no public utility shall make any change in any existing and duly established rate, except after sixty days' notice to the commission, which notice shall plainly state the changes proposed to be made in the rates then in force, and the time when the changed rates will go into effect. The public utility shall also give such notice of the proposed changes to other interested persons as the commission in its discretion may direct. All proposed changes shall be shown by filing new tariffs, or supplements to existing tariffs filed and in force at the time. The commission, for good cause shown, may allow changes in rates, without requiring the sixty days' notice, under such conditions as it may prescribe.

(b) Whenever there is filed with the commission by any public utility any tariff stating a new rate, the commission may, either upon complaint or upon its own motion, upon reasonable notice, enter upon a hearing concerning the lawfulness of such rate, and pending such hearing and the decision thereon, the commission,

upon filing with such tariff and delivering to the public utility affected thereby a statement in writing of its reasons therefor, may, at any time before it becomes effective, suspend the operation of such rate for a period not longer than six months from the time such rate would otherwise become effective, and an additional period of not more than three months pending such decision. The rate in force when the tariff stating the new rate was filed shall continue in force during the period of suspension, unless the commission shall establish a temporary rate as authorized in section three hundred ten of this act. The commission shall consider the effect of such suspension in finally determining and prescribing the rates to be thereafter charged and collected by such public utility.

(c) If, after such hearing, the commission finds any such rate to be unjust, or unreasonable, or in anywise in violation of law, the commission shall determine the just and reasonable rate to be charged or applied by the public utility for the service in question, and shall fix the same by order to be served upon the public utility; and such rate shall thereafter be observed until changed as provided by this act. 1937, May 28 P.L. 1053, art. III, §308.

m. §1149. Rates fixed on complaint.

Whenever the commission, after reasonable notice and hearing, upon its own motion or upon complaint, finds that the existing rates of any public utility for any service are unjust, unreasonable, or in anywise in violation of any provision of law, the commission shall determine the just and reasonable rates (including maximum or minimum rates) to be thereafter observed and in force and shall fix the same by order to be served upon the public utility, and such rates shall constitute the legal rates of the public utility until changed as provided in this act. Whenever a public utility does not itself produce or generate that which it distributes, transmits, or furnishes to the public for compensation, but obtains the same from another source, the commission shall have the power and authority to investigate the cost of such production or generation in any investigation of the reasonableness of the rates of such public utility. 1937, May 28, P.L. 1053, art. III, §309.

n. §1171. Character of service and facilities.

Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accomodation, convenience and safety of its patrons, employees, and the public. Such service also shall be reasonably continuous and without unreasonable interruptions or delay. Such service and facilities shall be in conformity with the regulations and orders of the commission. Subject to the provisions of this act and the regulations or orders of the commission, every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service. Any public utility service being furnished or rendered by a municipal corporation beyond its corporate limits shall be subject to regulation and control by the commission as to service and extensions with the same force and in like manner as if such service were rendered by a public utility. 1937, May 28, P.L. 1053, art. IV, §401.

o. §1172. Discrimination in service

No public utility shall, as to service, make or grant any unreasonable preference or advantage to any person, corporation, or municipal corporation, or subject any person, corporation, or municipal corporation to any unreasonable prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to service, either as between localities or as between classes of service, but nothing herein contained shall be deemed to prohibit the establishment of reasonable classifications of service. 1937, May 28, P.L. 1053, art. IV, §402.

p. §1182. Standards of service and facilities

The commission may, after reasonable notice and hearing, upon its own motion or upon complaint, prescribe as to service and facilities, including the crossing of facilities, just and reasonable standards, classifications, regulations and practices to be furnished, imposed, observed, and followed by any or all public utilities; prescribe adequate and reasonable standards for the measurement of quantity, quality, pressure, initial voltage, or other condition pertaining to the supply of the service of any and all public utilities; prescribe reasonable regulations for the examination and testing of such service, and for the measurement thereof; prescribe or approve reasonable rules, regulations, specifications, and standards to secure the accuracy of all meters and appliances for measurement; and provide for the examination and testing of any and all appliances used for the measurement of any service of any public utility. 1937, May 28, P.L. 1053, art. IV, §412; 1937 Sp. Sess., Sept. 28, P.L. 44, §1.

q. §1183. Regulation of Service

Whenever the commission, after reasonable notice and hearing, upon its own motion or upon complaint, finds that the service or facilities of any public utility are unreasonable, unsafe, inadequate, insufficient or unreasonably discriminatory, or otherwise in violation of this act, the commission shall determine and prescribe, by regulation or order, the reasonable, safe, adequate, sufficient, service or facilities to be observed, furnished, enforced, or employed including all such repairs, changes, alterations, extensions, substitutions, or improvements in facilities as shall be reasonably necessary and proper for the safety, accomodation, and convenience of the public, and shall fix the same by its order or regulation. 1337, May 28, P.L. 1053, art. IV, §413.

r. §1211. Mandatory systems of accounts

The commission may, after reasonable notice and hearing, establish systems of accounts (including cost finding procedures) to be kept by public utilities, or may classify public utilities and establish a system of accounts for each class, and prescribe the manner and form in which such accounts shall be kept. Every public utility shall establish such systems of accounting, and shall keep such accounts in the manner and form required by the commission. The accounting system of any public utility also subject to the jurisdiction of a Federal regulatory body shall correspond, as far as practicable, to the system prescribed by such Federal regulatory body: Provided, That the commission may require any such public utility to keep and maintain supplemental or additional accounts to those required by any such regulatory body. 1937, May 28, P.L. 1053, art. V, §501.

s. §1217. Inspection of books and records by commission.

The commission shall at all times have access to, and may designate any of its employees to inspect and examine, any and all accounts, records, books, maps, inventories, appraisals, valuations, or other reports, documents, and memoranda kept by public utilities, or prepared or kept for them by others: and the commission may require any public utility to file with the commission copies of any or all of such accounts, records, books, maps, inventories, appraisals, valuations, or other reports, documents and memoranda. 1937, May 28, P.L. 1053, art. V, §507.

t. §1241. Registration of securities to be issued or assumed.

(a) Under such regulations as the commission may prescribe, every public utility, before it shall execute, cause to be authenticated, deliver, or make any change or extension in any term, condition, or date of, any stock certificate or other evidence of equitable interest in itself, or any bond, note, trust certificate, or other evidence of indebtedness of itself, any or all of which acts are hereinafter included in the term "issuance of securities", shall have filed with the commission, and shall have received from the commission, notice of registration of a document to be known as a securities certificate: Provided, That neither (1) the execution, authentication, or delivery of securities to replace identical securities lost, mutilated, or destroyed while in the ownership of a bona fide holder-for-value, who properly indemnifies the public utility, therefor, nor (2) the execution, authentication, or delivery of securities in exchange for the surrender of identical securities, solely for the purpose of registering or facilitating changes in the ownership thereof between bona fide holders-for-value, which surrendered securities are thereupon cancelled, nor (3) the delivery from the treasury of the public utility of securities previously reacquired from bona fide holders-for-value and held alive, shall be deemed an issuance of securities under this subsection: And provided further, That the requirements of this paragraph shall not apply to the issuance of - (1) any evidence of indebtedness, the date of maturity, or which is at a period of less than one year from the date of its execution, (2) any evidence of indebtedness for which no date of maturity is fixed, but which matures upon demand of the holder, (3) any evidence of indebtedness in the nature of a contract between a public utility and a vendor of equipment wherein the public utility promises to pay installments upon the purchase price of equipment acquired, and which is not in the form of an equipment trust certificate or similar instrument readily marketable to the general public.

(b) Under such regulations as the commission may prescribe, every public utility, before it shall assume primary or contingent liability for the payment of any dividends upon any stocks, or of any principal or interest of any indebtedness, created or incurred by any other person or corporation, any or all of which acts are hereinafter included in the term "assumption of securities", shall have filed with the commission, and shall have received from the commission, notice of registration of a document to be known as a Securities Certificate: Provided, however, That the requirements of this paragraph shall not apply to an assumption of securities if the commission shall have approved the acquisition of all of the property of the issuing company by the assuming company, as provided in paragraph (e) of section two hundred two of this act. 1937, May 28, P.L. 1053, art. VI, §601; 1938, Sp. Sess., Sept. 28, P.L. 44, §1.

u. §1271. Contracts for services.

(a) Within thirty days after the effective date of this act, every public utility having in force any contract with an affiliated interest for the furnishing

to such public utility of any management, supervisory, purchasing, construction, engineering, financing, or other services, shall file a copy of such contract, or if oral, a complete statement of the terms and conditions thereof, with the commission.

(b) Every public utility which shall hereafter enter into any such contract, or which shall change any such existing contract, shall file a copy of such contract with the commission within ten days after its execution or charge.

(c) The commission shall have authority at any time to investigate every such contract filed in accordance with this section, and, if after reasonable notice and hearing, it shall determine that the amounts paid or payable thereunder are in excess of the reasonable cost of furnishing the services provided for in the contract, or that such services are not reasonably necessary and proper, it shall order such amounts, in so far as found excessive, to be stricken from the books of account of the public utility as charges to fixed capital, or operating expenses, as the case may be, and shall not consider such amounts in any proceeding. In any proceeding involving such amounts, the burden of proof to show that such amounts are not in excess of the reasonable cost of furnishing such service, and that such services are reasonable and proper, shall be on the public utility. 1937, May 28, P.L. 1053, art. VII, §701.

v. §1276. Contracts in violation of act void

Every contract with an affiliated interest, made effective or modified in violation of any provision of this act, or of any regulation or order of the commission made under this act, shall be void; and any purchase, sale, payment, lease, loan or exchange of any service, property, money, security, right, or thing under such contract, or under any contract with an affiliated interest, the terms of which shall have been breached by the affiliated interest, shall be unlawful. 1937, May 28, P.L. 1053, art. VII, §706.

w. §1341. Administrative authority of commission; regulations

The commission shall have general administrative power and authority to supervise and regulate all public utilities doing business within this Commonwealth. The commission may make such regulations, not inconsistant with the law, as may be necessary or proper in the exercise of its powers or for the performance of its duties under this act. 1937, May 28, P.L. 1053, art. IX, §901.

x. §1342. Commission to enforce act

In addition to any powers hereinbefore expressly enumerated in this act, the commission shall have full power and authority, and it shall be its duty, to enforce, execute, and carry out, by its regulations, orders, or otherwise, all and singular the provisions of this act, and the full intent thereof; and shall have the power to rescind or modify any such regulations or orders. The express enumeration of the powers of the commission in this act shall not exclude any power which the commission would otherwise have under any of the provisions of this act. 1937, May 28, P.L. 1053, art. IX, §902.

y. §1343. Enforcement proceedings by commission

Whenever the commission shall be of opinion that any person or corporation including a municipal corporation, is violating, or is about to violate, any

provisions of this act; or has done, or is about to do, any act, matter, or thing herein prohibited or declared to be unlawful; or has failed, omitted, neglected, or refused, or is about to fail, omit, neglect, or refuse, to perform any duty enjoined upon it by this act; or has failed, omitted, neglected or refused or is about to fail, omit, neglect, or refuse to obey any lawful requirement, regulation, or order made by the commission; or any final judgment, order, or decree made by any court, then and in every case the commission may institute in the court of common pleas of Dauphin County, injunction, mandamus, or other appropriate legal proceedings, to restrain such violations of the provisions of this act, or of the regulations, or orders of the commission, and to enforce obedience thereto; and such court of common pleas is hereby clothed with exclusive jurisdiction throughout the Commonwealth to hear and determine all such actions. No injunction bond shall be required to be filed by the commission. Such persons, corporations, or municipal corporations as the court may deem necessary or proper to be joined as parties, in order to make its judgment, order or writ effective, may be joined as parties. The final judgment in any such action or proceeding shall either dismiss the action or proceeding, or direct that the writ of mandamus or injunction issue or be made permanent as prayed for in the petition, or in such modified or other form as will afford appropriate relief. 1937, May 28, P.L. 1053, art. IX, §903, as amended. 1971 June 3, P.L. -, No. 6, §1 (§509(a)(115)).

z. §1345. Reports by public utilities

The commission may require any public utility to file periodical reports at such times and in such form, and of such content, as the commission may prescribe, and special reports concerning any matter whatsoever about which the commission is authorized to inquire, or to keep itself informed, or which it is required to enforce. The commission may require any public utility to file with it a copy of any report filed by such public utility with any Federal department or regulatory body. All reports shall be under oath or affirmation when required by the commission. 1937, May 28, P.L. 1053, art. IX, §905.

aa. §1347. Adherence to regulations and orders of commission and courts.

Every public utility, its officers, agents, and employees, and every other person or corporation subject to the provisions of this act, affected by or subject to any regulations or orders of the commission, or of any court, made, issued, or entered under the provisions of this act, shall observe, obey and comply with such regulations or orders, and the terms and condition thereof, so long as the same shall remain in force. 1937, May 28, P.L. 1053, art. IX, §907.

bb. §1348. Inspection of, and access to, facilities and records of public utilities

The commission shall have full power and authority, either by or through its members, or duly authorized representatives, whenever it shall deem it necessary or proper, in carrying out any of the provisions of this act, or its duties under this act, to enter upon the premises, buildings, machinery system, plant, and equipment and make any inspection, valuation, physical examination, inquiry, or investigation of any and all plant and equipment, facilities, property, and pertinent records, books, papers, memoranda, documents, or effects whatsoever, of any public utility, and to hold any hearing for such purposes. In the performance of such duties, the commission may have access to, and use any books, records, or documents in the possession of, any department, board, or commission of the Common-

wealth, or any political subdivision thereof. 1937, May 28, P.L. 1053, art. IX, §908.

cc. §1360. Contracts; power of the commission to vary, reform or revise

The commission shall have power and authority to vary, reform, or revise, upon a fair, reasonable, and equitable basis, any obligations, terms, or conditions of any contract heretofore or hereafter entered into between any public utility and any person, corporation, or municipal corporation which embrace or concern a public right, benefit, privilege, duty, or franchise, or the grant thereof, or are otherwise affected or concerned with the public interest and the general well being of the Commonwealth.

Whenever the commission shall determine, after reasonable notice and hearing, upon its own motion or upon complaint, that any such obligations, terms, or conditions are unjust, unreasonable, inequitable, or otherwise contrary or adverse to the public interest and the general well being of the Commonwealth, the commission shall determine and prescribe by findings and order, the just, reasonable, and equitable obligations, terms and conditions of such contract. Such contract, as modified by the order of the commission, shall become effective thirty days after the service of such order upon the parties to such contract. 1937, May 28, P.L. 1053, art. IX, §920.

dd. §1391. Complaints

The commission, or any person, corporation, or municipal corporation having an interest in the subject matter, or any public utility concerned, may complain in writing, setting forth any act or thing done or omitted to be done by any public utility in violation, or claimed violation, of any law which the commission has jurisdiction to administer, or of any regulation or order of the commission. Any public utility, or other person, or corporation, subject to this act, likewise may complain of any regulation or order of the commission, which the complainant is or has been required by the commission to observe or carry into effect. The commission, by regulation, may prescribe the form of complaints filed under this section. 1937, May 28, P.L. 1053, art. X, §1001.

ee. §1395. Decisions by commission

After the conclusion of the hearing, the commission shall make and file its findings and order with its opinion, if any. Its findings shall be in sufficient detail to enable the court on appeal, to determine the controverted question presented by the proceeding, and whether proper weight was given to the evidence. A copy of such order, certified under the seal of the commission, shall be served by registered mail upon the person, corporation or municipal corporation against whom it runs, or his attorney, and notice thereof shall be given to the other parties to the proceedings, or their attorney. Such order shall take effect and become operative as designated therein, and shall continue in force either for a period which may be designated therein, or until changed or revoked by the commission. If an order cannot, in the judgment of the commission, be complied with within the time designated therein, the commission may grant and prescribe such additional time, as, in its judgment, is reasonably necessary to comply with the order, and may, on application and for good cause shown, extend the time for compliance fixed in its order. 1937, May 28, P.L. 1053, art. X, §1005.

ff. §1398. Investigations

The commission may, on its own motion and whenever it may be necessary in the performance of its duties, investigate and examine the condition and management of any public utility or any other person or corporation subject to this act. In conducting such investigations the commission may proceed, either with or without a hearing, as it may deem best, but it shall make no order without affording the parties affected thereby a hearing. 1937, May 28, P.L. 1053, art. X, §1008.

B. Utilities Gross Receipts Tax

72 P.S. §8101

Every railroad company, pipeline company, conduit company, steamboat company, canal company, slack water navigation company, transportation company, and every other company, association, joint-stock association, or limited partnership, now or hereafter incorporated or organized by or under any law of this Commonwealth, or now or hereafter organized or incorporated by any other state or by the United States or any foreign government, and doing business in this Commonwealth, and every copartnership, person or persons owning, operating or leasing to or from another corporation, company, association, joint-stock association, limited partnership, copartnership, person or persons, any railroad, pipeline, conduit, steamboat, canal, slack water navigation, or other device for the transportation of freight, passengers, baggage, or oil, except taxicabs, motor buses and motor omnibuses, and every limited partnership, association, joint-stock association, corporation or company engaged in, or hereafter engaged in, the transportation of freight or oil within this State, and every telephone company, telegraph company, express company, electric light company, waterpower company, hydroelectric company, gas company, palace car company and sleeping car company, how or hereafter incorporated or organized by or under any law of this Commonwealth, or now or hereafter organized or incorporated by any other state or by the United States or any foreign government and doing business in this Commonwealth, and every limited partnership, association, joint-stock association, copartnership, person or persons, engaged in telephone, telegraph, express, electric light and power, waterpower, hydro-electric, gas, palace car or sleeping car business in this Commonwealth, shall pay the the State Treasurer, through the Department of Revenue, a tax of forty-five mills upon each dollar of the gross receipts of the corporation, company or association, limited partnership, joint-stock association, copartnership, person or persons, received from passengers, baggage, and freight transported wholly within this State, from express, palace car or sleeping car business done wholly within this State, or from the sales of electric energy or gas, except gross receipts derived from sales of gas to any municipality owned or operated public utility and except gross receipts derived from the sales or resale of electric energy or gas, to persons, partnerships, associations, corporations or political subdivisions subject to the tax imposed by this act upon gross receipts derived from such resale and from the transportation of oil done wholly within this State. The gross receipts of gas companies shall include the gross receipts from the sale of artificial and natural gas, but shall not include gross receipts from the sale of liquefied petroleum gas. The said tax shall be paid within the time prescribed by law, and for the purpose of ascertaining the amount of the same, it shall be the duty of the treasurer or other proper officer of the said company, copartnership, limited partnership, association, joint-stock association or corporation, or person or persons, derived from all sources and of gross receipts from business done wholly within this State, during the period of twelve months immediately preceding January 1 of each year. It shall be the further duty of the treasurer or other proper officer of every such corporation or association and every individual liable by law to report or pay said tax, except municipalities, to

transmit to the Department of Revenue on or before April 30 of each year, a tentative report in like form and manner for each twelve month period beginning January 1, of each year. The tentative report shall set forth (i) the amount of gross receipt received in the period of twelve months next preceding and reported in the annual report; or (ii) the gross receipts received in the first three months of the current period of twelve months; and (iii) such other information as the Department of Revenue may require.

Upon the date its tentative report is required to be made, the corporation, association or individual making the report shall compute and pay to the Department of Revenue on account of the tax due for the current period of twelve months at its election (i) for the year 1971 not less than twenty-nine and one-third mills of the dollar amount of its gross receipts reported for the entire preceding period of twelve months; or (ii) for the year 1971 not less than one hundred and seventeen and one-third mills of the dollar amount of its gross receipt received within the first three months of the current period of twelve months. Notwithstanding any other provision in this section to the contrary, for the year 1972 and each year thereafter the corporation, association or individual making a tentative report shall transmit such report to the Department of Revenue on account of the tax due for the current period of twelve months and compute and make payment with such report pursuant to the provisions of the act of March 16, 1970 (P.L. 180).

The time for filing reports may be extended, estimated settlements may be made by the Department of Revenue if reports are not filed, and the penalties for failing to file reports and pay the tax shall be as prescribed by the laws defining the powers and duties of the Department of Revenue. In any case where the works of any corporation, company, copartnership, association, joint-stock association, limited partnership, person or persons, the taxes imposed by this section shall be apportioned between the corporations, companies, copartnerships, associations, joint-stock associations, limited partnerships, person or persons in accordance with the terms of their respective leases or agreement, but for the payment of the said taxes the Commonwealth shall first look to the corporation, company, copartnership, association, joint-stock association, limited partnership, person or persons operating the works, and upon payment by the said company, corporation, copartnership, association, joint-stock association, limited partnership, person or persons of a tax upon the receipts, as herein provided, derived from the operation thereof, no other corporation, company, copartnership, association, joint-stock association, limited partnership, person or persons shall be held liable under this section for any tax upon the proportion of said receipts received by said corporation, company, copartnership, association, joint-stock association, limited partnership, person or persons for the use of said works.

This article shall be construed to apply to municipalities, and to impose a tax upon the gross receipts derived from any municipality owned or operated public utility or from any public utility service furnished by any municipality, except that gross receipts shall be exempt from the tax, to the extent that such gross receipts are derived from business done inside the limits of the municipality, owning or operating the public utility or furnishing the public utility service. 1971, March 4, P.L. -, No. 2, art. XI, §1101, as amended 1971, Aug. 31, P.L. -, No. 93, §7.

C. Pa. P.U.C. - Tariff Regulations

a. Section II. PUBLIC NOTICE OF TARIFF CHANGES

1. Unless the Commission otherwise orders, no public utility to which these rules apply shall make any change in any existing and duly established tariff except after sixty (60) days' notice to the public.

2. Each notice shall plainly state the changes proposed in the tariff then in force, and the date on which the changes will become effective. (See Section III).

b. Section VIII. DISCOUNT FOR PROMPT PAYMENT AND PENALTIES FOR DELAYED PAYMENT OF BILLS

Every public utility that imposes penalties upon its customers for failure to pay bills promptly, or allows its customers discounts for prompt payment of bills, shall provide in its posted and filed tariffs a rule setting forth clearly the exact circumstances and conditions in which the penalties are imposed or discounts are allowed. The tariff shall also indicate clearly whether, if bills are paid by mail, the date of the postmark will be considered the date of payment.

D. Pa. P.U.C. - Electric Regulations

Rule 14 - ADJUSTMENT OF BILLS FOR AVERAGE METER ERROR

D. ACCESS TO METERS - The public utility shall at all reasonable times have access to meters, service lines and other property owned by it on customer's premises, for purposes of maintenance and operation. Neglect or refusal on the part of customers to provide reasonable access to their premises for the above purposes shall be deemed to be sufficient cause for discontinuance of service.

E. Metropolitan Edison Company Electric Tariff
Electric Pa. P.U.C. No. 41

Rule 15. Cause for discontinuance of service:

Company reserves the right to discontinue its service on reasonable notice and to remove its equipment in case of nonpayment of bill or violation of the Pennsylvania Public Utility Commission's or Company's Rules and Regulations, or, without notice, for abuse, fraud, or tampering with the connections, meters or other equipment of Company. Failure by Company to exercise this right shall not be deemed a waiver thereof.

Should the Company's service be terminated for any cause aforesaid, the minimum charge for the unexpired portion of the term shall become due and payable immediately, provided, however, that if satisfactory arrangements are subsequently made by Customer for reconnection of the service (in which event, a reconnection charge of not less than $1.00 must be paid) the immediate payment of the minimum charge for the unexpired portion of the contract term may be waived or modified as the circumstances indicate would be just and reasonable.

Company may refuse its service to, or remove its service from, any installation which, in the judgment of Company, will injuriously affect the operation of Company's system or its service to other Customers.
Issued April 30, 1971. Effective June 30, 1971

F. Kansas Statutes Annotated

K.S.A. 66-101

Power, authority and jurisdiction. The state corporation commission is given full power, authority and jurisdiction to supervise and control the

public utilities, including radio common carriers, and all common carriers, as hereinafter defined, doing business in the state of Kansas, and is empowered to do all things necessary and convenient for the exercise of such power, authority and jurisdiction.

G. Federal Statutes

a. 42 U.S.C. §1983 Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

b. 28 U.S.C. §1343 Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote. June 25, 1948, c. 646, 62 Stat. 932; Sept. 3, 1954, c. 1263, §42, 68 Stat. 1241; Sept. 9, 1957, Pub. L. 85-315, Part III, §121, 71 Stat. 637.

H. United States Constitution

Fourteenth Amendment
Section 1
Due Process Clause

. . . nor shall any state deprive any person of life, liberty or property without due process of law . . .

APPENDIX B

Man, Seventy-one, Freezes to Death After Utility Shuts Off Gas, United Press International, appearing in Boston Globe, (Feb. 9, 1974), p. 17

Man, 71, freezes to death after utility cuts off gas

United Press International

MILWAUKEE — Everybody is sorry about what happened to Harold Radtke.

The Wisconsin Public Service Corp. (PSC) turned off the gas at Radtke's home in Pushtigo Jan. 28 because he had not paid his gas bill for three months.

The 71-year-old bachelor's frozen body was found Tuesday, lying face up on the floor of his home, dressed in five shirts. There were several blankets on his sleeping couch. Radtke had apparently been trying to get warmth from a vacuum cleaner motor and an electric heating plate.

The temperature outside was 1 degree above zero. Inside it was 20. Pans of water on the stove were frozen. So were the toilet and the kitchen sink.

A spokesman for the PSC said yesterday it was "a horrible tragedy." But he denied the company had done anything wrong.

The trouble was that Radtke had not paid a $138 gas bill in three months. He had been warned and had indicated he would pay. But he didn't.

The last time Radtke's heat was turned off in June, his brother, Wilbert, of Lewiston, Idaho, paid the bill. The brother says he told the PSC if there was ever any trouble again to let him know. The PSC said it has no record of that.

Elderly Couple Found Frozen in Syracuse Home, The New York Times, Dec. 26, 1973.

THE NEW YORK TIMES, WEDNESDAY, DECEMBER 26, 1973

Elderly Couple Found Frozen in Syracuse Home

Grandson Discovers Bodies— Utility Had Cut Off Power for Nonpayment of Bill

SCHENECTADY, N.Y., Dec. 25 (UPI) — A man and his wife, both in their 90's were found dead yesterday, apparently frozen to death in their unheated home.

Basil Heise, a serviceman on holiday leave, discovered the bodies of his grandparents when he went to their home to take them to a Christmas Eve dinner. The couple — Frank Baker, 93 years old, and his wife, Katherine, 91 — were found huddled together on their living room floor by Mr. Heise, who called the police.

A deputy county medical examiner, Dr. John Shields, said the couple had apparently been dead for about two days. He tentatively listed death as due to natural causes brought on by exposure, but said he would have an official ruling follow-

A spokesman for the Niagara Mohawk Power Corporation, which provides the area with electricity and natural gas, said power to the home had been turned off last Thursday for nonpayment of a five-month-old $202 bill.

The elderly coupel refuseo to allow a utility man into the home to shut off the gas, and it was still on at the time of their deaths, he said.

The utility spokesman said turning off the electricity to the home would have made any gas furnace inoperative, but would not have precluded the use of a gas cooking stove which could have provided some heat.

The utilities were cut off six months ago, he said, out were reinstated when a church paid tentatively if the delinquent bill.

Contacted by the power company several times about their bill, the Bakers refused to discuss it, a power company spokesman said.

Last week, the telephone company cut off service, also for nonpayment of bills, a spokesman said.

Supreme Court, U. S.
FILED
MAY 28 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of The United States

October Term, 1974
No. 73-5645

CATHERINE JACKSON,
On Behalf of Herself and All Others Similarly Situated,
Petitioner,

vs.

METROPOLITAN EDISON COMPANY,
a Pennsylvania Corporation,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

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IN THE

Supreme Court of The United States

October Term, 1974
No. 73-5845

CATHERINE JACKSON,
On Behalf of Herself and All Others Similarly Situated,
Petitioner,

vs.

METROPOLITAN EDISON COMPANY,
a Pennsylvania Corporation,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Whether a complaint which seeks to enjoin the termination by Respondent of electric service to premises owned by the complainant fails to state a cause of action under 42 U.S.C. § 1983 when Respondent's customer was another person (not related to complainant) who had not paid previous bills for service and who no longer occupied such premises.

II. Whether the termination of electric service by an investor-owned electric utility pursuant to its own rules and without express authorization by any State agency constitutes action taken under color of State law for the purposes of the Fourteenth Amendment and 42 U.S.C. § 1983.

SUPPLEMENT TO PETITIONER'S STATEMENT OF THE CASE

In two respects, it is necessary to supplement Petitioner's statement of the case:

1. Petitioner states that she has been a "a residential utility customer of Respondent Metropolitan Edison Company since March 1969 * * *".

The record shows that Petitioner testified that she was a customer of Respondent from March 1969 until September 22, 1970, when "the electric was disconnected in my name" (App. 22-23); that, on September 22, 1970, she went out to make a telephone call to Respondent to inquire about the disconnection and had been advised that service had been disconnected for non-payment (App. 24); that when she returned, 45 minutes later (App. 31), the electricity had been turned back on and that thereafter bills for service "started coming in James Dodson's name" (App. 23-24);

that she had no knowledge of whether the bills in the name of Dodson were ever paid (App. 24) but that she assumed that he had made such payments (App. 32); that Dodson had resided in Petitioner's house from March 1969 until August 1971 but was neither a co-owner or tenant (App. 26); that, during the period September 22, 1970 through October 11, 1971, Respondent had not paid any bill for electricity consumed in her home (App. 29); that, on October 6, 1971 she advised Respondent's representative who was seeking Dodson that Dodson "didn't live there any more" (App. 25); that, on October 7, 1971, another representative of Respondent advised her that somebody had "crossed some kind of line" (App. 27) but she had no knowledge that this had occurred (App. 27) and that "he would have to go back to the company and find out just what was going on and just what was what" (App. 27); that, in that same conversation with Respondent's representative, she had stated that service should be "put in the name of a Robert Jackson", who was her 12-year-old son (App. 29-30) and that electric service to her residence had been terminated on October 11, 1971 (App. 26).

2. Petitioner testified that she had received no written or oral notice prior to the October 11, 1971 termination of service. The District Court made no finding as to whether or not notice had been given. However, as the Court of Appeals observed, Respondent's tariff provides, in fact, that "reasonable notice must be given before termination", so that no issue is presented to this Court concerning a customer's right to reasonable prior notice.

SUMMARY OF ARGUMENT

I. Although the point was not raised below in support of Respondent's motion to dismiss Petitioner's complaint for failure to state a cause of action as to which relief can be granted, Respondent wishes to note that the service, the

termination (for nonpayment) of which Petitioner seeks to prevent, was not being rendered to her and had not been rendered to her for more than a year. Even assuming that the Fourteenth Amendment requires that an investor-owned electric company must afford a customer opportunity for a hearing prior to the termination of service, Respondent would not be required to afford Petitioner a hearing because Respondent's customer was a person unrelated to Petitioner who occupied the same premises. It was that individual to whom the unpaid bills were sent, Petitioner not being on Respondent's customer list and even now denying liability therefor. Because she was not Respondent's customer, Petitioner has failed to state a cause of action in alleging that Respondent proposes to terminate electric service to her premises.

II. In terminating electric service, Respondent did not act under color of State law. Respondent is an investor-owned electric utility supplying electric service in parts of Pennsylvania, a service which has never been performed by the Commonwealth for all of its residents. Respondent is subject to regulation by the Pennsylvania Public Utility Commission. But the fact that Respondent's services are beneficial to society is not sufficient to characterize the performance of those services as the carrying on of a state function. To do so would obliterate the fundamental difference between State and private action envisioned by the Fourteenth Amendment. (Similarly the fact that Respondent is subject to taxation by the Commonwealth does not transform Respondent into a "partner" of the Commonwealth or impute Respondent's acts to the Commonwealth.)

Nor does Respondent's substantial monopoly position or its operation under the supervision of the Pennsylvania Public Utility Commission convert its acts into the acts of the Commonwealth. Such a conversion requires the

explicit authorization or approval of the Public Utility Commission of the acts contemplated and no such specific authorization or approval was granted. Furthermore, the pattern of Federal regulation to which Respondent is subject—which pattern exempts activities of States and their agencies—is clearly incompatible with the notion that the acts of Respondent constitute the acts of the Commonwealth.

Neither do Respondent's rules and regulations constitute the effectuation by the Commonwealth of a state policy repugnant to the Constitution, for Respondent's policies and practices with respect to termination of service are not encouraged by the State. Indeed, the State has evidenced no interest in their formulation or execution.

Acceptance of Petitioner's claim for relief would effectively constitute a taking of Respondent's property in violation of the Fifth Amendment of the Constitution. Requiring Respondent to continue to furnish electric service to customers without reasonable assurance of payment would result in Respondent's being forced to provide such service without being compensated therefor and in its being deprived of property without due process of law.

ARGUMENT

I. Petitioner's complaint fails to state a cause of action upon which relief may be granted because termination of service to which her complaint is directed was not service to her.

This case is one of many in which plaintiffs have sought to establish that the termination of the service rendered by electric, gas and telephone utilities, without prior hearing, violates the Fourteenth Amendment of the United

States Constitution[1] and 42 U.S.C. §1983.[2] Such claims have been passed upon, with conflicting results, by United States District Courts in Districts in Colorado[3], Connecticut[4], Kansas[5], and New York[6], and by United States Courts of Appeals in the Third[7], Sixth[8], Seventh[9], and Eighth[10], Circuits; similar claims are pending in other courts.

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[1] Section 1 of the Fourteenth Amendment provides, in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[2] 42 U.S.C. § 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress." The "under color of" state law requirement of 42 U.S.C. § 1983 and the "state action" requirement of the Fourteenth Amendment have been construed to be of the same breadth and scope. *United States* v. *Price*, 383 U.S. 787, 794 n. 7 (1965).

[3] *Hattell* v. *Public Service Co.*, 350 F.Supp. 240 (D. Colo. 1972).

[4] *Salisbury* v. *Southern New England Telephone Co.*, 365 F.Supp. 1023 (D. Conn. 1973).

[5] *Stanford* v. *Gas Service Co.*, 346 F.Supp. 717 (D. Kans. 1972).

[6] *Bronson* v. *Consolidated Edison Co.*, 350 F.Supp. 443 (S.D. N.Y. 1972).

[7] *Jackson* v. *Metropolitan Edison Co.*, 483 F.2d 754 (3rd Cir. 1973).

[8] *Palmer* v. *Columbia Gas of Ohio, Inc.*, 479 F.2d 153 (6th Cir. 1973).

[9] *Kadlec* v. *Illinois Bell Telephone Co.*, 407 F.2d 624 (7th Cir.), *cert. denied*, 396 U.S. 846 (1969); *Lucas* v. *Wisconsin Electric Power Co.*, 466 F.2d 638 (7th Cir. 1972), *cert. denied*, 409 U.S. 1114 (1973).

[10] *Ihrke* v. *Northern States Power Co.*, 459 F.2d 566 (8th Cir.), vacated as moot, 409 U.S. 815 (1972); *Palmer* v. *Columbia Gas of Ohio, Inc.*, 479 F.2d 153 (6th Cir. 1973).

In view of the extensive litigation with respect to this issue, and the attention it has received from legal commentators[11], it is with some diffidence that Respondent brings to the attention of the Court its view that the termination of electric service to which Petitioner's complaint is addressed could not have deprived her of any Constitutionally-protected right since that termination was not of service to her.

Although Respondent did not rely on this ground in support of its motion before the District Court to dismiss the complaint for failure to state a cause of action, it is well settled that, if the result below is correct, it must be affirmed although the lower court relied upon a wrong ground or gave a wrong reason. *Helvering v. Gowran*, 302 U.S. 238, 245, rehearing denied, 302 U.S. 781 (1937); *Helvering v. Rankin*, 295 U.S. 123, 132-33 (1935).

If an issue has been properly raised in the court or courts below (and Respondent in this case has raised the Petitioner's failure to state a cause of action in its motion to dismiss), an appellee may, without taking a cross appeal, urge in support of the judgment below any matter appearing in the record even though such matter was overlooked or ignored by the court below, so long as the appellee does not seek to enlarge his own rights or lessen the rights of his adversary under the decree. *Morley Construction Co. v. Maryland Casualty Co.*, 300 U.S. 185, 191, rehearing denied, 300 U.S. 687 (1937); *Langnes v. Green*, 282 U.S. 531, 535 et. seq. (1931); *United States* v. *American Railway Express Co.*, 265 U.S. 425, 435 (1924). (Since the decree below merely granted Respondent's motion and dismissed Petitioner's complaint, there is no question of enlarging Respondent's

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[11] See, for example, Shelton, "Shutoff of Utility Services for Non-Payment; A Plight of the Poor", 46 Wash. L. Rev. 745 (1971); "Constitutional Safeguards for Public Utility Customers: Power to the People", 48 N. Y. U. L. Rev. 493 (1973); "Fourteenth Amendment Due Process in Terminations of Utility Service for Non-Payment", 86 Harv. L. Rev. 1477 (1973); "Public Utilities and the Poor", 78 Yale L. J. 48 (1969).

rights or lessening Petitioner's rights under the decree.) In the light of the recent decisions of the Court in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) and *DeFunis v. Odegaard*, 42 U.S. L.W. 4578 (U.S. April 23, 1974), which, in effect, caution against the rush to reach Constitutional confrontations not necessarily involved by the facts of the particular case presented to the Court, Respondent feels compelled to note its view that, no matter how broadly one construes "property interests" and "state action", Petitioner's complaint and testimony demonstrate that she had no Constitutionally-protected right to receive electric service from Respondent.

By her own testimony Petitioner had ceased to be a customer of Respondent on September 22, 1970.[12] At that time she was delinquent in the payment of bills for service, and she has never cured that delinquency. Thereafter, although Respondent furnished electric service to the premises owned by Petitioner for an additional 13 months and the meters with respect to such service were read regularly, Respondent's customer was James Dodson who resided in Petitioner's home until August 1971, and Petitioner acquiesced in the substitution of Dodson for herself as Respondent's customer. Petitioner knew that Respondent's bills were rendered to Dodson and not to herself and she had no knowledge as to whether such bills were ever paid by Dodson. Although Dodson ceased to reside in Petitioner's house in August 1971, she made no effort to establish service in her own name. Indeed, when Respondent's representative came to her house on October 6, 1971 inquiring for Dodson, she stated that service should be "put in the name of Robert Jackson", her 12-year-old son.

Pending the outcome of these proceedings, Respondent is furnishing electric services to the premises, pursuant to the

[12] Petitioner's complaint in the District Court (App. 9) and brief in this Court (Pet. Br. 4) make clear that Petitioner's complaint was directed to the October 11, 1971 termination and not to the September 22, 1970 termination.

terms of a temporary restraining order of the District Court (App. 13) and of an Order of the District Court continuing the temporary restraining order (App. 75). Respondent has not billed Petitioner for service rendered under such orders and Petitioner has not paid for such service.

Petitioner's own complaint contains an implicit disavowal that *she* was a customer of Respondent for a period of a year prior to the allegedly wrongful termination of service on October 11, 1971, to which her complaint is addressed, for her complaint states in paragraph 9 that:

> "The billing party or person responsible for said bill, since on or about October 1970, has been and is one James Dodson, a former co-occupant with Plaintiff, of the above premises."

In her statement of questions presented and frequently throughout her brief, Petitioner refers to non-payment of a "disputed bill" (e.g., Pet. Br. 3, 4, 7), but the record does not disclose that she was disputing her own unpaid bill for service rendered prior to September 22, 1970. Similarly, while in her complaint she states that she has "an adequate defense to her alleged liability of the utility bill" (App. 10), the only defense to such liability which she presented was that Dodson "had assumed full liability for such payment".[13]

Accepting, *arguendo*, Petitioner's contention that the termination of electric service to a customer by an investor-owned utility without prior opportunity for a hearing is within the Constitutional proscription of the Fourteenth Amendment and 42 U.S.C. § 1983 it is Dodson—and not Petitioner—whose rights have been denied, and it is Dodson —not Petitioner—who can assert a claim of such denial. As Petitioner's complaint disavows responsibility for payment

[13] In her brief in this Court, Petitioner states that Dodson "had assumed full responsibility for payment" (Pet. Br. 4).

of Respondent's bills to Dodson, Petitioner is compelled to assert in substance that it is the premises that she owns that are entitled to electric service from Respondent. But the protection of the Fourteenth Amendment applies to "persons" and not "premises".

Nor can Petitioner successfully contend that she became Respondent's customer on October 7, 1971, after Respondent learned the previous day that Dodson no longer resided in the premises. Instead, Petitioner's own testimony on that score is that Respondent's representative stated that he would have to go back to the Company and find out what was going on and that she had told him that electric service should be put in the name of Robert Jackson, her 12-year-old son. There is no evidence that she had requested that service be furnished to her or that either she or her 12-year-old son had in fact been accepted by Respondent as Respondent's customer.

In *Goldberg v. Kelly*, 397 U.S. 254 (1970), the Court held that a State may not, without prior hearing, terminate the payment of welfare benefits to one who has been receiving such payments. It did not there hold that a State is compelled to initiate such payments before being satisfied that the claimant is entitled to receive them and Justice Black, in dissent, urged that one consequence of the majority's holding was that, in order to protect itself against improper claims, a State would be likely to be more rigorous in its investigations before initiating such payments. *Id.* at 278-79. If a State is not constitutionally compelled to initiate welfare payments to a claimant before being satisfied that the claimant is entitled to such payments, it is difficult to believe that an investor-owned electric utility is constitutionally compelled to furnish electric service to a potential applicant for such service (let alone to her minor son) who has not complied with Respondent's regulations relating to the initiation of such service, merely because she is seeking such service for the same premises as those previously also

occupied by another (delinquent) customer to whom service was previously rendered by the utility.

Petitioner's complaint was filed not only on her own behalf but also as a class action. By reason of the fact that she was not, and for more than a year had not been, a customer of Respondent, it may be doubted whether, if the issue had been presented to the District Court for decision, that Court would have found Petitioner to be an adequate representative of the alleged class. But that matter is not before this Court. The District Court never made a class action determination. Consequently, Petitioner's own lack of any Constitutionally-protected interest with its attendant lack of jurisdiction cannot be cured on this review by the class action allegations which were not decided by the Courts below.

II. In adopting and filing with the Pennsylvania Public Utility Commission its general rules and regulations and in administering such general rules and regulations, Respondent did not "act under color of state law".

A. *The furnishing of electric service is not, and has never been, a function performed by the Commonwealth of Pennsylvania for all of its residents.*

It has been repeatedly held that the commands of the Fourteenth Amendment are addressed only to the State or to those acting under color of its authority, that the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful", and that the reach of 42 U.S.C. § 1983 is of similarly limited scope. *District of Columbia v. Carter*, 409 U.S. 418, 423-24 (1973). In apparent deference to its recognition of this well-established proposition, Petitioner first characterizes the role performed by Respondent as the discharge of a "public function", then equates the discharge of "public functions"

to "State action", and finally concludes therefrom that the acts of Respondent are the acts of the Commonwealth. But this proposition does not withstand analysis.

There is no question that Respondent discharges a function which is subject to licensing, regulation and other control by the State and which, in many contexts, can accurately be described as "public functions". So, too, are the functions performed by innkeepers, grain storage elevators, warehousemen and many other forms of economic activity. But the fact that the State has the power to license and regulate the acts of a private person does not convert such acts to State action. In conducting its business, Respondent is not discharging a function that has ever been a function of the Commonwealth of Pennsylvania.

Respondent and its predecessors were organized under the provisions of the Corporation Act of 1874[14], which antedated by almost a half century the enactment in 1913 of the first comprehensive public utility regulatory statute, the Pennsylvania Public Service Company Law.[15] When Respondent and its predecessors were organized, the great majority of the residents of the Commonwealth did not receive electric service. Indeed, throughout the Nation, the history of electric service has been one of the gradual extension of electric service from urban clusters to more remote areas as population has grown and technology has changed. Even today, there are a relatively few residents of the Commonwealth who do not receive electric service and the Commonwealth has not assumed any responsibility to provide such service to them. Thus, in the supply of electric service, Respondent has not assumed a responsibility of the Commonwealth and is not acting for the Commonwealth in furnishing such service.

The fact that some boroughs in Pennsylvania have elected to undertake the distribution of electric service pursuant to Pennsylvania Third Class City Code (53 P.S. § 38575) does

[14] 15 P.S. §§ 3001, 3014.

[15] Act 1913, July 26, P.L. 1374.

not elevate the furnishing of electric service to a State function. Instead, it reinforces the proposition that the Commonwealth has not undertaken responsibility for the furnishing of electric service to all its residents, that it merely permits its boroughs to assume such responsibility if their local officials and electorates wish them to do so. But functions performed by private parties do not become State functions because they are occasionally performed by States or local municipal bodies.

Almost a century ago, the Pennsylvania Supreme Court rejected the argument that the furnishing of water and gas constituted a State function. *Girard Life Insurance Co. v. The City of Philadelphia,* 88 Pa. 393 (1879). This view was reiterated by the Pennsylvania Supreme Court in *Baily v. Philadelphia,* 184 Pa. 594, 39 A. 494 (1898), in which the Court held that even the furnishing of street lighting was not a municipal duty.[16]

By contrast, there are functions which, by tradition, the State constitution or State legislation are State functions. Among those are the furnishing of free education[17], police protection, the conduct of elections, etc. When the State delegates the performance of such functions to a private party, the action of the private party in conducting such functions is state action, as the Court held in *Food Employees Local 590 v. Logan Valley Plaza,* 391 U.S. 308 (1968), *Evans v. Newton,* 382 U.S. 296 (1966), *Cooper v. Aaron,* 358 U.S. 1 (1958), *Terry v. Adams,* 345 U.S. 461 (1953), *Marsh v. Alabama,* 326 U.S. 501 (1946), *Smith v. Allwright,* 321 U.S. 649 (1944) and *Nixon v. Condon,* 286 U.S. 73 (1932).

[16] *Cf. Moose Lodge No. 107 v. Irvis,* 407 U.S. 163, 175 where in support of the position that a private corporation does not act under color of State law merely because it may be the beneficiary of State supplied services such as police and fire protection, or the providing of water or electricity, the Court states that such a holding would "utterly emasculate the distinction between private and state conduct".

[17] This has been required by the Pennsylvania Constitution since 1790. See Pa. Const. of 1790, art. 7, § 1 (53 P.S. § 47471).

B. *The fact that Respondent's activities benefit its customers and are subject to regulation does not convert such activities into State action.*

It has been suggested that where "significant state interests are promoted through particular conduct, then the ostensibly private party comes under color of law and within the ambit of the Fourteenth Amendment" (Brief for the Legal Aid Foundation of Long Beach et al. as Amicus Curiae at 21). The test proposed is an appealing one but, if accepted, would bring within the ambit of the Fourteenth Amendment a whole variety of actions universally considered to be without it. For example, assuming the promotion of the public health to be a "significant state interest," would not the application of this formula mean that doctors, because of their being permitted to practice solely by virtue of being licensed from the State, be subjected to precisely the same restraints on billing and termination of services as amici propose for electric utilities? Would not the same be true of optometrists and hairdressers? Again, would not laws regulating the ingredients of food items bring all vendors of such products "within the ambit of the Fourteenth Amendment"? Any licensing or regulatory system is predicated upon the concept that the public interest is affected by the acts of those subject to such licensing or regulation. At issue is whether the promotion of "significant state interest" by the grant of a license or imposition of regulation automatically subjects individuals so licensed or regulated to restrictions similar to those placed upon State government itself. We submit that such a result effectively destroys the distinction between private and public action which has been fundamental to the operation of the Fourteenth Amendment since its adoption. For that reason amici's test must be rejected.

C. *The fact that Respondent has a substantial monopoly of electric service within its service area and operates as a public utility under the authority of the Pennsylvania Public Utility Law does not convert its acts into the acts of the Commonwealth unless and until such acts are specifically authorized or approved by a Commonwealth agency.*

Petitioner has stated as fact that Respondent is a "state sanctioned monopoly" (e.g. Pet. Br. 7, 13), possesses an "exclusive franchise" (e.g. Pet. Br. 7) or "exclusive territory" (e.g. Pet. Br. 24) and enjoys a "guaranteed fair rate of return" (e.g. Pet. Br. 24). Respondent might well appreciate these attributes if they were true, but they are not. While Respondent does, in fact, have a substantial monopoly in its service area, Respondent's certificate of public convenience does not give it the exclusive right to furnish electric service in its service area. In certain parts of its service area another investor-owned utility also has a certificate of public convenience to furnish service and customers have from time to time elected to change their supplier of electric service.

Furthermore several boroughs within Respondent's service area themselves furnish electrical service to their residents, and a rural electric cooperative does the same for its members. Petitioner's own City of York could itself compete with Petitioner by purchasing electricity at wholesale and retailing it to its residents.

Thus the Respondent does not exercise a State-granted exclusive monopoly as Petitioner alleges. Moreover, the fact that a public utility possesses a substantial monopoly pursuant to governmental authorization does not in and of itself make the acts of the public utility those of the government. *Public Utilities Commission v. Pollak*, 343 U.S. 451, 462 (1952). Nor is the mere existence of authority to regulate sufficient to convert private action to State action. There must be a closer nexus; the act complained of must have been specifically authorized in some fashion by the State agency. *Public Utilities Commission v. Pollak, supra; Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

State regulation does not, of course, provide a "guaranteed fair rate of return" as alleged by Petitioner. One

need only look at the history of railroads and street railways to discern that rate regulation provides no such umbrella. Indeed, under the inflationary conditions existing during the past several years, Respondent, like many other electric utilities, has been unable to earn a fair rate of return, largely by reason of the inhibitions of the rate regulatory process on its attempts to price its service on a compensatory basis.

In our view, the decision of the Pennsylvania Supreme Court in the *Girard Life* case[18] demonstrated astounding foresight in recognizing, in 1879, that a municipality could not arbitrarily discontinue water or gas service to one to whom it had previously furnished such service, not because the furnishing of such service was a municipal function but because it would be a State agency (i.e., municipality) that was acting arbitrarily in so doing, even though the service that it had provided was not a state function.[19]

D. *The fact that Respondent's activities are subject to extensive regulation under Federal statutes and by Federal agencies is incompatible with the concept that its status as a public utility subject to regulation by the Commonwealth makes its acts those of the Commonwealth.*

A catalogue of the Federal statutes, regulations and agencies to which Respondent is subject would be almost endless. For example, it is subject to regulation by the Federal Power Commission under Parts II and III of the Fed-

[18] 88 Pa. 393 (1879).

[19] Plaintiff puts great stress on electricity being a necessity of life. If she is thereby suggesting that the right to receive electrical service should constitute a property right or a privilege of the citizens of the United States, she should deal with the ancillary questions of whether providing such service may be conditioned upon payment therefor. If her argument that the providing of electricity constitutes a 'public function' means only that its provision by governmental entities has been so commonplace that it has taken on the coloration of a right or privilege, experience of the past eighty years, during which the overwhelming proportion of electric service has been provided by investor-owned companies, is sufficient disproof.

eral Power Act[20] and, as a subsidiary of a registered public utility holding company, by the Securities and Exchange Commission under the Public Utility Holding Company Act of 1935.[21] Both of these statutes are not applicable to States or State agencies.[22] If, as Petitioner contends, action by the Commonwealth in granting of certificates of public convenience to Respondent and subjecting it to comprehensive regulatory authority makes Respondent's acts those of the State, then the same reasoning should make Respondent an agency of the Commonwealth for purposes of exemption from Parts II and III of the Federal Power Act and the Public Utility Holding Company Act of 1935—which is clearly not the case.

In *Otter Tail Power Company v. United States,* 409 U.S. 820 (1973), the Court held that an electric utility company was in violation of Section 2 of the Sherman Act (15 U.S.C. § 2). Since the Sherman Act does not apply to States and State agencies, that holding cannot be reconciled with Petitioner's argument that all acts of a public utility which possesses State-granted franchise rights and is subject to comprehensive regulation by a State agency are ipso facto the acts of a State.

The "sifting of facts and weighing of circumstances" approach employed by the Court for in applying 42 U.S.C. § 1983 obviously means that a meat axe cannot be employed as Petitioner would have the Court do. What is required is careful diagnosis and the use of a surgeon's skill and scalpel

[20] 16 U.S.C. § 824(a) et seq.

[21] 15 U.S.C. § 79 et seq.

[22] Section 201(f) of the Federal Power Act (16 U.S.C. § 824(f)) provides in pertinent part:

> "No provision in [this Part] shall apply to, or be deemed to include, the United States, a State or any political subdivision of a state, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference there'o."

Section 2(c) of the Public Utility Holding Company Act (15 U.S.C. § 79b(c)) is essentially similar.

to lay bare whether a particular act is designed to effectuate a State policy repugnant to the Fourteenth Amendment or is otherwise pursuant to clear State authorization.

E. *The rules and regulations of Respondent and its administration thereof do not constitute the effectuation by the Commonwealth, directly or indirectly, of State policies which are repugnant to the United States Constitution.*

Most of the cases presenting "State action" issues to this Court have represented attempts to perpetuate, through purportedly private instrumentalities, the prior racial discriminatory State policies which were the cause of adoption of the Fourteenth Amendment to the Constitution.

Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) involved the use of restaurant facilities owned by a State agency and leased to an allegedly private entity—but on terms which made the State agency a joint participant with the private entity—to discriminate against customers on the grounds of race. *Peterson v. City of Greenville,* 373 U.S. 244 (1963), involved segregation by a private entity at its lunch counter pursuant to local city ordinances requiring the separation of races in restaurants. *Lombard v. Louisiana,* 373 U.S. 267 (1963) involved racial segregation by a private entity where public statements by the Superintendent of Police and Mayor were viewed by the Court as equivalent to the city ordinance in *Peterson. Robinson v. Florida,* 387 U.S. 153 (1967) involved racial segregation by a private entity pursuant to the requirements of a State regulatory agency. *Reitman v. Mulkey,* 387 U.S. 369 (1967) involved legislation enacted pursuant to a citizens' initiative which had the effect of expressly authorizing racial discrimination in housing, and which the California Supreme Court believed would significantly encourage and involve the State in private discrimination. *Evans v. Newton,* 382 U.S. 296 (1966), involved an attempt to perpetuate racial discrimination in a park which for years had been operated and maintained by the City of Macon, Georgia as trustee on a racially discriminatory basis, through the substitution of new trustees for the City.

In *District of Columbia v. Carter,* 409 U.S. 418 (1973), Justice Brennan reviewed on behalf of a unanimous Court the derivation of 42 U.S.C. § 1983 from Section 1 of the Ku Klux Klan Act of 1871[23]. In holding that 42 U.S.C. § 1983 does not apply to the District of Columbia, he emphasized that "[a]ny analysis of the purposes and scope of § 1983 must take cognizance of the events and passions of the time at which it was enacted" (409 U.S. at 425) and that the remedy created by this Section was "against those who representing a State in some capacity were unable or unwilling to enforce a State law" (409 U.S. at 426); *Monroe v. Pape,* 365 U.S. 167, 175-76 (1961). The terms of the Act reflected an early expectation that a State might attempt to perpetuate racial discrimination in multiform ways—or by "statute, ordinance, regulation, custom or usage". The history of racial discrimination since the adoption of the Fourteenth and Fifteenth Amendments, and the almost infinite number of forms and devices resorted to in an attempt to perpetuate prior traditions of racial discrimination have borne out this expectation. It is in this context that the "sifting of facts and weighing of circumstances" approach has been employed by the Court to reach the substance, rather than the form, employed for that purpose, and, most important to this case, to ascertain whether there is a nexus between (a) the State's relationship to the private entity and (b) the act of the private entity to which the complaint is directed. Thus, even though *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163 (1972) also involved racial discrimination, the Court found that there was no nexus between the granting by the State of a license to serve liquor and the practice of racial discrimination by the licensee. The Court pointed out that, with one exception, no Pennsylvania statute governing liquor licensing "either overtly or covertly" encouraged discrimination[24] and that, therefore, there was no State-commanded result. The Court also pointed out that the State's liquor licensing "is nothing approaching the symbi-

[23] Act of April 20, 1871, 17 Stat. 13

[24] 407 U.S. at 173.

otic relationship between the lessor and lessee that was present in Burton."[25]

There is a point at which verbal formulations to describe sophisticated attempts to achieve forbidden conduct run into difficulty. Formulations in terms of "state-commanded result", "symbiotic relationship", "significant involvement" of the State and the like are admirable in terms of their flexibility to reach and proscribe conduct, no matter how concealed or verbalized, which is contrary to the comprehensive protection of the Fourteenth Amendment. By the same token, such formulations should not be applied to acts which are privately initiated and executed and are neither fostered nor encouraged, let alone required, by "statute, ordinance, regulation, custom or usage".

By contrast with these cases involving discrimination on account of race, nothing in the Pennsylvania Constitution, statutes, or regulations commanded or approved action by Respondent to terminate electric service to a customer for non-payment of bills for service previously rendered to him. The Pennsylvania Constitution does not deal with the matter at all. Section 401 of the Pennsylvania Public Utility Law (66 P.S. § 1171) requires a public utility to "furnish and maintain adequate, efficient, safe and reasonable service" which shall "be reasonably continuous and without unreasonable interruptions or delays". That same section also provides in part that "subject to the provisions of this Act and the regulations or orders of the Commission, every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service."

The non-intervention of the State, and expressly of the Pennsylvania Public Utility Commission, in the discontinuance of service for non-payment of bills is reinforced by the provisions of subsection 202(d) of the Pennsylvania

[25] 407 U.S. at 175.

Public Utility Law (66 P.S. § 1122). That subsection provides:

> "Upon approval of the commission, evidenced by its certificate of public convenience first had and obtained, and upon compliance with existing laws, and not otherwise, it shall be lawful: ***
>
> "(d) For any public utility to dissolve, or to abandon or surrender, in whole or in part, any service, right, power, franchise, or privilege: Provided, That the provisions of this paragraph shall not apply to discontinuance of service to a patron for nonpayment of a bill, or upon request of a patron."

Section 302 of the Pennsylvania Public Utility Law (66 P.S. § 1142) requires a public utility to file with the Commission within such time and in such form as the Commission may designate, tariffs showing all rates established by it and to keep copies of such tariffs open to public inspection. Sections 304 and 402 (66 P.S. §§ 1144 and 1172) prohibit a public utility, in respect of both rates and service, from granting any unreasonable preference or advantage to any person or from subjecting any person to any unreasonable prejudice or disadvantage. Thus, if Petitioner is correct in her contention that the termination of utility service to indigent customers subjects such customers, solely by reason of indigency, to unreasonable prejudice or disadvantage, the Commonwealth has not endorsed such action; on the contrary it has forbidden it.

Other sections of the Pennsylvania Public Utility Law give the Commission broad authority to regulate many aspects of Respondent's operations. For example, if the Commission finds that the service of a public utility is unreasonable or unreasonably discriminatory, the Commission is directed to prescribe, by regulation or order, reasonable and adequate service. (Section 413, 66 P.S. § 1183). It is also authorized to prescribe adequate and

reasonable standards, regulations and practices to be observed by public utilities. (Section 412, 66 P.S. § 1182). The Commission has general administrative power and authority to supervise all public utilities doing business within the Commonwealth (Section 901, 66 P.S. § 1341) and to enforce the Act by its regulations and orders (Section 902, 66 P.S. § 1342).

Up to this date, the Pennsylvania Commission has taken no action either to approve or disapprove explicitly Respondent's termination rule. Petitioner's brief explicitly confirms this in stating that the Pennsylvania Commission has specifically refused to promulgate additional rules and regulations regarding utility company collection and termination practices and dismissed, on March 20, 1974, the petition of several low income consumers (including that of Petitioner) to institute rule-making proceedings on that subject.[26]

The only action taken by the Commission thus far is reflected in its Tariff Regulation VIII, which provides:

> "Every public utility that imposes penalties upon its customers for failure to pay bills promptly, or allows its customers discounts for prompt payment of bills, shall provide in its posted and filed tariffs a rule setting forth clearly the exact circumstances and conditions in which the penalties are imposed or discounts are allowed. The tariff shall also indicate clearly whether, if bills are paid by mail, the date of the postmark will be considered the date of payment."

On its face this Tariff Regulation of the Commission does not appear necessarily to deal with terminations of service. Rather, it appears to deal with financial penalties (e.g. interest or penalty charges) for late payments and

[26] Pet. Br, 33. It is, of course, conceivable that such action by the Pennsylvania Commission may be subject to attack by Petitioner under 42 U.S.C. § 1983. But, if such an attack is to be made by her, it would be based on that action of the Pennsylvania Commission and not upon actions taken by Respondent.

discounts for prompt payments. But, even assuming that it embraces a penalty in the form of termination of service, the Regulation neither endorses nor disapproves of such termination.[27]

As the District Court noted:

> "However, the mere requirement that Metropolitan Edison clearly spell out any penalties it will impose for non-payment of bills does not clothe Metropolitan Edison with state authority nor transform the defendant's regulations into acts of the state. Rather, the purpose of Tariff Reg. VIII is to insure that public utilities inform their patrons of any possible penalty for failing to pay their bills". (App. 78)

Respondent's tariff provision relating to discontinuance of service provides, in pertinent part (App. 46):

> "(15)—*Cause for discontinuance of service:*
>
> Company reserves the right to discontinue its service on reasonable notice and to remove its equipment in case of nonpayment of bill or violation of the Pennsylvania Public Utility Commission's or Company's Rules and Regulations; or, without notice, for abuse, fraud or tampering with the connections, meters or other equipment of Company. Failure by Company to exercise this right shall not be deemed a waiver thereof."

Because the decision of the Court below (at App. 84) draws an inference—favorable to Respondent—concerning the genesis of this provision of Respondent's tariff which is not wholly correct, and because this inference, which is based on the silence of the record, has also been adopted

[27] During its current session—i.e., since the granting of the petition for certiorari—the Pennsylvania Legislature has amended the State's Public Utility law to prohibit the termination of electric service on Friday, Saturday or Sunday or on certain holidays. By not reaching the question before the Court, it does not affect the Petitioner's rules and regulations regarding the manner of termination and continues the State's policy of inaction in the area.

by Petitioner and amici, we deem it necessary to supplement the record in this respect. Court Exhibit No. 6 filed in the District Court consisted of the tariff sheets and supplements showing the provisions of Respondent's Tariff No. 40 relating to residential electric service which were in effect during the period January 1, 1970 to and including June 29, 1971. Court Exhibit No. 7 was Respondent's Electric Tariff No. 41 showing the provisions of such Tariff relating to residential electric service as they were in effect subsequent to June 30, 1971. Respondent's Electric Tariff No. 41 and Supplement No. 1 thereto were filed by Respondent with the Pennsylvania Public Utility Commission on April 30, 1971. The primary purpose of filing Electric Tariff No. 41 was to provide for a proposed annual rate increase of approximately $12,600,000 and of Supplement No. 1 thereto was to provide for a further increase of approximately $10,000,000. However, in accordance with the general practice of public utilities in Pennsylvania designed to prevent tariffs from becoming unduly cumbersome with numerous supplements and provisions, Respondent included in Electric Tariff No. 41 not only its new rates but also all of its pre-existing general rules and regulations (App. 38-63) including its Regulation No. 15 to which Petitioner's complaint is directed. This Regulation 15 had been in effect as part of Respondent's prior tariffs.

By Commission Order of June 28, 1971, the Pennsylvania Commission suspended for six months the operation of the Supplement (thereby precluding the additional $10,000,000 increase provided for in the Supplement), but it did not suspend Electric Tariff No. 41 itself and the $12,600,000 increase therein provided for was permitted to become effective June 30, 1971. However, by a concurrent order dated June 28, 1971, the Commission instituted an investigation for the purpose of determining the fairness, reasonableness, justness and lawfulness of the rates, charges, rules and regulations proposed in Tariff No. 41 and Supplement thereto.

Various complaints with respect to Electric Tariff No. 41 and Supplement thereto were filed but no complaint was directed at Regulation No. 15. Hearings were held during the period September 30, 1971 to March 10, 1972, oral argument held before the Commission and the Commission decision was rendered on August 8, 1972. No issue was presented in the proceeding with respect to Respondent's Regulation No. 15, no testimony with respect thereto was presented and no finding made thereon.

In its August 8, 1972 order, the Commission authorized increased rates aggregating approximately 76% of the total increase proposed in Electric Tariff No. 41 and the Supplement. It did not direct any changes in any of Respondent's rules or regulations. It directed Respondent to file, effective for service rendered on or after the date of the order, a further supplement containing acceptable rates to provide total annual revenues at the rate allowed by its order, together with supporting calculations, and Respondent did so promptly thereafter.

It is Respondent's view that such action by the Commission does not constitute State action by the Commission or any other agency of the State with respect to the matters which are the subject of this proceeding, but we have set forth this information in order to clarify the record on this score.

It is Respondent's view that, far from there being State action in the case before the Court, there has been consistent State inaction. Unlike Respondent's charges for service, Respondent's Regulation regarding termination, though contained in Respondent's tariff, has never been specifically approved by the Pennsylvania Public Utility Commission.[28]

[28] *Cf. Public Utilities Commission* v. *Pollak*, 343 U.S. 451 (1952) where the Commission specifically approved the action complained of.

F. *The fact that Respondent's revenues are subject to taxation by the State and local subdivisions thereof does not bring Respondent's actions within the ambit of the Fourteenth Amendment.*

In *Ihrke* v. *Northern States Power Co.*, 459 F.2d 566 (8th Cir.), vacated as moot, 409 U.S. 815 (1972), the Eighth Circuit based a finding of State action on the fact that the City which regulated the utility also received 5% of the utility's gross earnings. The Court below in this case appeared to distinguish Respondent's situation from that involved in *Ihrke*, without making clear its basis for such distinction (App. 86). If the holding in *Ihrke* is correct, Respondent shares with Petitioner the view that Respondent's situation is indistinguishable. Respondent pays gross receipts tax to the Commonwealth [29] which, through the Pennsylvania Public Utility Commission, also regulates Respondent.

Respondent believes that argument thus adopted by the Eighth Circuit in *Ihrke* is wrong. It proves too much. By that test, any private entity which pays any tax on gross receipts or net income and whose receipts or earnings are enhanced by the act complained of would be deemed to be acting for the State for purposes of the Fourteenth Amendment and 42 U.S.C. § 1983. Just as the receipt of State-furnished services does not "emasculate the distinction between private as distinguished from State conduct", *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 173 (1972), so the payment of general taxes does not emasculate that distinction.

G. *Since Respondent did not employ facilities or authority of the Commonwealth to effect the termination of service, the manner of such termination is not central to a finding that the termination did not involve action under color of State law.*

The Court below laid stress on the fact the termination was effected by Respondent without entry on Petitioner's

[29] Respondent also pays a separate gross receipts tax to the City of York, Pennsylvania, where Petitioner resides.

premises (App. 84). Although this was the fact in this case, Respondent submits that the result should have been the same if this termination had been effected on Petitioner's premises. Most electric utility terminations are effected on the customer's premises at the meter. The record is silent concerning the reason for effecting this particular termination at Respondent's pole and not on Petitioner's premises.

Respondent's terminations of service are a matter of self-help effected in accordance with its own regulations (App. 44-45); the grant of authority by its customers to Respondent of access to such premises is one of the "conditions under which service is rendered" (App. 38). Although Petitioner asserts that such access is dependent upon a grant of authority from the Pennsylvania Public Utility Commission in the latter's Rule 14D (reproduced at Pet. Br. App. A. at 13a), an examination of that Rule demonstrates that it relates to access "for purposes of maintenance and operation." Respondent does not rely upon this Rule of the Commission for access to a customer's premises for termination. It relies on the terms of its own Regulations which are, as noted, a condition of its undertaking to supply service.

Termination of service by a utility with its own personnel pursuant to its agreement with its customer thus stands on a different footing than the use of State officials under a writ of replevin as presented in *Fuentes v. Shevin*, 407 U.S. 67 (1972). In that case, creditors caused a State official to act. In this instance no State personnel are involved.

H. *The practical consequence of acceptance of Petitioner's position would be to deprive Respondent of property without due process of law in violation of the Fifth Amendment.*

As set forth above, the claim that Petitioner is disputing any bill is attenuated at best. But, assuming the existence of a genuine dispute, Petitioner's claim is that she

may use the Federal courts to compel Respondent to spend its funds and property to provide service to her without payment or assurance of payment.

Petitioner and amici lay great stress on some instances of hardship suffered by consumers, but they apparently pay no attention to the heavy burden on utilities their investors and the general public caused by delinquency in payments by customers and the encouragement to such delinquency caused by an inflexible requirement for hearing prior to termination. In *Palmer v. Columbia Gas of Ohio, Inc.*, 342 F. Supp. 241 (N.D. Ohio W.D. 1972), *aff'd*, 479 F.2d 153 (6th Cir. 1973), particularly relied upon by Petitioner, the Federal District Court found that the utility there involved, which served a total of 140,000 customers, annually mailed out 120,000 to 140,000 notices of proposed termination, but actually discontinued service in only 6,000 instances. It has been reported that some electric utilities have as many as one-third of their total customer accounts in arrears, and that this has been a significant factor in the financial crisis suffered by Consolidated Edison Company of New York, Inc.[30]

An inflexible requirement for a prior hearing before an impartial hearing officer (with or without appointment of counsel) would not only greatly add to the administrative burden in conducting utility operations, but would greatly increase the delinquency rate and the losses suffered by utilities. The proposed termination procedures set forth by amicus curiae, National Consumer Law Center, Inc., and the commentator in *"Fourteenth Amendment Due Process in Terminations of Utility Service for Non-payment"* appear to ignore this aspect and assume that these costs will in some unspecified fashion be borne by a willing general public. If so, their appeal should be to the Legislature and not to the Federal Courts. It may well be that these social policies they urge will be best achieved by

[30] New York *Daily News*, May 22, 1974, page 30.

[31] 86 Harv. L. Rev. 1477, 1494 (1973).

revised welfare procedures in which welfare agencies would provide funding for disputed utility bills.

In the interim, one cannot assume that utilities can recover these costs. They do not have the taxing powers available to reimburse themselves for losses suffered and, in that respect, are in a different posture from the government which can be reimbursed through the exercise of taxing powers for payments made to unqualified welfare recipients. *Goldberg v. Kelly*, 395 U.S. 254 (1970). As previously stated, Respondent and many other utilities have in fact been unable for some time to earn the fair return which is the purported standard of rate regulation. The granting of Petitioner's complaint would accentuate this problem and produce a result in which an attempt to insist on "due process" hearings before any utility termination deprived a great many of substantial property rights in order to protect potential property rights of a few. Due process requires a better balancing of competing interests and a recognition that not all problems of our society can be thrust upon the courts.

CONCLUSION

For the foregoing reasons, Respondent respectfully urges that this Court affirm the action of the Court below.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1974

No. 73-5845.

CATHERINE JACKSON, on Behalf of Herself and All Others Similarly Situated,

Petitioner,

v.

METROPOLITAN EDISON COMPANY, a Pennsylvania Corporation,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF AMICUS CURIAE ON BEHALF OF THE CITY OF PHILADELPHIA, URGING AFFIRMANCE.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No. 73-5845.

CATHERINE JACKSON, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED,

Petitioner,

v.

METROPOLITAN EDISON COMPANY,
A PENNSYLVANIA CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF AMICUS CURIAE ON BEHALF OF THE CITY OF PHILADELPHIA, URGING AFFIRMANCE.

INTEREST OF AMICUS CURIAE.

The City of Philadelphia holds legal title to the real and personal property (including real estate, buildings, equipment, gas pipes and automobiles) of the Philadelphia

Gas Works ("PGW"), which is used in furnishing gas service to customers in the Philadelphia area. By agreement dated December 29, 1972 ("Agreement") the City effectively delivered PGW to Philadelphia Facilities Management Corporation ("PFMC"), a nonprofit corporation organized and existing under the Pennsylvania Nonprofit Corporation Law which is engaged in the operation and management of PGW. The rates, rules and regulations of PGW are subject to regulation by the Philadelphia Gas Commission, a city agency created by the Charter of the City of Philadelphia.

PGW sends monthly bills for gas service to each of 500,000 customers. Approximately thirty-eight thousand (38,000) of these bills are not paid by the due date each month and require further collection efforts. As part of the further collection efforts, the delinquent customer receives a "shut-off notice," informing him that unless his gas bill is paid within six days of receipt of the notice, his gas service will be terminated.

The use of the shut-off notice has been vital in enabling PFMC to collect the revenues needed to enable PGW to continue to provide gas service to its customers.

The response of PGW customers to the receipt of the shut-off notice has been positive. Despite the necessity of sending approximately thirty-eight thousand (38,000) shut-off notices *per month*, the actual number of shut-offs for non-payment has numbered only twenty thousand (20,000) *per year*.

Based upon the experience of PFMC and PGW, it is believed that there are approximately thirty-eight thousand (38,000) PGW customers who will not pay their gas bills until they are faced with the imminency of a discontinuance of their service and who view the shut-off notice as the last step prior to shut-off of their gas service.

The City of Philadelphia has been named a defendant in a suit brought in the United States District Court for the Eastern District of Pennsylvania, *Dawes, et al. v. Philadelphia Gas Commission, et al.*, Civil Action No. 73-2592 (E. D. Pa. Complaint filed November 15, 1973), which raises issues similar to those presented by the petitioner, Jackson, in the case at bar. In the *Dawes* case, the plaintiff likewise seeks to require the defendant public utility to provide an adversary hearing before an impartial arbitrator prior to termination of gas service. In an affidavit filed of record in that case, the General Manager of PGW has estimated that the impact upon PGW's cash flow of thirty-eight thousand (38,000) extended delinquencies per month—pending hearings of the type sought by the petitioner in this case—would be substantial and would require a readjustment of the existing tariff so as to compensate therefor at the expense of the non-delinquent subscribers. The impact upon PGW's operating expenses, were PFMC required to conduct or attend thirty-eight thousand (38,000) hearings per month, would be catastrophic, even assuming that it would be humanly possible to schedule and conduct hearings at the indicated rate of some two thousand (2,000) hearings per weekday, every weekday of the year. The alternative to conducting hearings as described above, were such hearing to be held by this Court to be a prerequisite to shut-off, would be to continue supplying gas to a substantial (and presumably growing) number of gas users who do not pay for the gas they consume—a scenario which would create, at the worst, chaos, and, at the best, the onerous, unfair burden upon the non-delinquent gas users of ever-escalating gas rates.

In the submission of the City of Philadelphia, an adversary hearing prior to termination for non-payment is not constitutionally required.

ARGUMENT.

I. Due Process Does Not Require a Public Utility to Provide an Adversary Hearing Prior to Discontinuance of Further Services.

The decisions of this Court establish that due process does not require a trial-type hearing in every conceivable case of government impairment of private interest. As Mr. Justice Stewart stated, in elaborating on this point for the Court in *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U. S. 886, 895 (1961), "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."

However, placing principal reliance upon a line of cases culminating in *Fuentes v. Shevin*, 407 U. S. 67 (1972), Petitioner controverts this basic axiom in the central proposition of the due process argument of her brief (Brief for Petitioner, p. 36):

> "A deperivation of a property interest or entitlement requires that the opportunity to be heard and to contest the deprivation be provided before the loss of the property or benefit. *Fuentes v. Shevin*, 407 U. S. 67 (1972); *Bell v. Burson*, 402 U. S. 535 (1971); *Goldberg v. Kelly*, 397 U. S. 254 (1970); *Boddie v. Connecticut*, 401 U. S. 371 (1971)."

Further reliance upon *Fuentes* for a "Procrustean rule of a prior adversary hearing" is misplaced, for that decision can now fairly be said to have been overruled by this Court in *Mitchell v. W. T. Grant Co.*, — U. S. —, 42 U. S. L. W. 4671 (No. 72-6160 Opinion filed May 13, 1974). In *Mitchell*, the Court substituted for the broad, inflexible requirement of a prior adversary hearing a more refined variety of due

process analysis which, it is submitted, results in a more perfect accommodation of the conflicting property rights of both buyers *and sellers* in disputes arising out of sales of tangible property. There, the Court upheld the constitutionality of a Louisiana statute authorizing seizure and sequestration of goods from a delinquent purchaser, without prior notice and without a prior adversary hearing. The Court acknowledged the continuing property interest of the seller and held that the necessity of affording adequate protection for that property interest justified postponing an adversary hearing until after the sequestration has been accomplished. Mr. Justice White there stated for the Court:

> "Plainly enough, this is not a case where the property sequestered by the court is exclusively the property of the defendant debtor. The question is not whether a debtor's property may be seized by his creditors, *pendente lite*, where they hold no present interest in the property sought to be seized. *The reality is that both seller and buyer had current real interests in the property and the definition of the property rights is a matter of state law. Resolution of the due process question must take account not only of the interests of the buyer of the property but those of the seller as well.*"
>
> *Mitchell v. W. T. Grant*, — U. S. —, 42 U. S. L. W. at 4672-4673. (Emphasis supplied.)

While the decision in *Mitchell* rested on the "duality" of the property interests involved, the case at bar presents an even more compelling case for protection of the seller's property interests and, in application to this case, the *Mitchell* rationale requires affirmance of the determination of the Court of Appeals that due process does not require

a prior adversary hearing before discontinuance of utility service for non-payment. The sale of utility service is inherently a credit transaction. The public utility provides the service and in so doing must rely on the agreement of the customer to pay for the service provided. If the customer does not pay for the service consumed, the seller has no way of recovering the electricity, gas or water which the customer has already consumed. The value of seller's property interest is reduced, by the buyer's consumption, to zero. Thus, the "duality" of property interests present in *Mitchell* is absent in this case—the seller alone bears the risk. This contrast is underscored by the analysis in *Mitchell:*

> "Wholly aside from whether the buyer, with possession and power over the property, will destroy or make away with the goods, the buyer in possession of consumer goods will undeniably put the property to its intended use, and the resale value of the merchandise will steadily decline as it is used over a period of time. Any installment seller anticipates as much, but he is normally protected because the buyer's installment payments keep pace with the deterioration in value of the security. Clearly, if payments cease and possession and use by the buyer continue, the seller's interest in property as security is steadily and irretrievably eroded until the time at which the full hearing is held."
>
> *Mitchell v. W. T. Grant Co.*, — U. S. —, 42 U. S. L. W. at 4674.

Under the more flexible approach of *Mitchell,* it is submitted that the seller's increased risk, together with the absence of risk to any property interest of the buyer, justifies termination of service for non-payment without a prior adversary hearing.

Thus conceived, the case of termination of utility service for non-payment of utility bills may be placed on a spectrum of due process decisions of this Court. At one end of that spectrum is *Sniadach v. Family Finance Corp.*, 395 U. S. 337 (1969), involving the prejudgment garnishment of wages, where the suing creditor had *no* prior interest in the property attached. That opinion "did not purport to govern the typical use of the installment seller who brings a suit to collect an unpaid balance and who does not seek to attach wages pending the outcome of the suit but to repossess the sold property on which he had retained a lien to secure the purchase price." *Mitchell v. W. T. Grant Co.*, — U. S. —, 42 U. S. L. W. at 4676. No "duality" of property interests was involved in *Sniadach,* and prejudgment garnishment of wages was held unconstitutional.

Mitchell v. W. T. Grant Co., supra, did involve property interests of *both* the seller and the buyer, and the "duality" of property interests was held to be a decisive factor in the decision in that case upholding sequestration of the goods in question, without prior notice and an adversary hearing.

The case at bar is the polar opposite of *Sniadach.* In *Sniadach,* the seller had no prior interest in the property to be attached in the hands of the buyer. In this case, unlike *Sniadach* and *Mitchell,* the seller *alone* has a property interest in the goods to be withheld. It is submitted, therefore, that the rationale of *Mitchell* is applicable with even greater force under the circumstances of this case.

Petitioner's reliance upon an overly broad reading of the entitlement cases, *Bell v. Burson,* 402 U. S. 535 (1971) and *Goldberg v. Kelly,* 397 U. S. 254 (1970) is likewise misplaced. The special circumstances of *Goldberg v. Kelly, supra,* were emphasized in the opinion. There, the Court agreed with the observation in *Kelly v. Wyman,* 294 F. Supp. 893, 899 (S. D. N. Y. 1968), that "[b]y hypothesis, a

welfare recipient is destitute, without funds or assets." 397 U. S. at 261.

Of course, no such assumption is justified in the case of delinquent utility customers. Nor does the lack of electric service pending resolution of the controversy over an unpaid bill deprive the customer of "the very means by which to live while he waits," as was observed of welfare benefits in *Goldberg v. Kelly*, 397 U. S. at 264.

The attempt to apply the rationale of *Goldberg v. Kelly, supra*, to this case is, in actuality, an attempt to take the argument of that case one step beyond its holding.

Moreover, the entitlement cases do not provide an apt analogy to the case of public utility terminations for nonpayment. Provision of utility service involves the sale of a commodity; it does not purport to be, nor does it qualify as, a "governmental benefit" within the scope of that term as used in *Goldberg v. Kelly*, 397 U. S. at 263. Further, as the Court of Appeals observed (A-90, n. 14), the entitlement cases generally deal with a privilege or right conferred by the State of something which it alone can grant.

Quite apart from these general considerations distinguishing the entitlement cases from this case is a special feature of *Bell v. Burson, supra*, where the Court struck down a provision of Georgia's Motor Vehicle Safety Responsibility Act providing that the license of an uninsured motorist involved in an accident shall be suspended unless he posts security to cover the amount of damages claimed by aggrieved parties in reports of the accident. As is evident from the Court's citation in *Bell v. Burson*, 402 U. S. at 539, of *Shapiro v. Thompson*, 394 U. S. 618 (1969), an equal protection decision, the result in *Bell v. Burson, supra*, was predicated on alternative holdings, first upon the ground that the Georgia statute created an impermissible classification, of Georgia-licensed drivers who had been "in

any manner involved" in an accident, which did not bear a reasonable relationship to the legitimate state interest involved, and was therefore violative of the Equal Protection Clause. It is submitted that the result is only *alternatively* predicated on the due process holding relied upon by the Petitioner in this case, and that the due process holding was not necessary for the decision of the case.

The public employment cases cited by Petitioner, such as *Perry v. Sindermann*, 408 U. S. 593 (1972), again involve determinations by state or federal governmental officials which directly affect the aggrieved citizen's means of life and source of income, as in *Goldberg v. Kelly*. To the extent that it rests upon due process principles, the same is true of *Bell v. Burson, supra*. It is submitted that these cases are inapposite for that reason.

II. Conclusion.

For all of the foregoing reasons, the judgment of the Court of Appeals for the Third Circuit should be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-5845

CATHERINE JACKSON, on behalf of herself and all others similarly situated,
Petitioner,

v.

METROPOLITAN EDISON COMPANY, a Pennsylvania utility corporation,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTIONS FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-5845

CATHERINE JACKSON, on behalf of herself and all others similarly situated,
Petitioner,

v.

METROPOLITAN EDISON COMPANY,
a Pennsylvania utility corporation,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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MOTIONS FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 42 of the Rules of the Supreme Court, the National Consumer Law Center, Inc. applies to the Court for leave to file the enclosed brief *Amicus Curiae* in support of the Petitioner, Catherine Jackson.

The National Consumer Law Center is a legal services technical assistance program which is to devise and implement programs of research, training, and resource assistance in support of some 2100 attorneys throughout the United States who provide direct legal services to the

poor. During the past several years, the Center has appeared before this Court as *Amicus* in *Swarb* v. *Lennox*, 405 U.S. 174 (1972); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972); and *Mourning* v. *Family Publications*, —— U.S. ——, 36 L. Ed. 2d 318 (24 April 1973).

In the context of residential utility service, the Center has provided substantial assistance to those legal services attorneys who have litigated the due process issues of access to utility service. Our participation has included appearance as *Amicus* in *Palmer* v. *Columbia Gas of Ohio, Inc.*, 479 F.2d 153 (6th Cir. 1973) and in *Jackson* v. *Metropolitan Edison Co.*, 483 F.2d 754 (3d Cir. 1973). In addition, the Center has included a chapter on residential utility service deposits and eligibility in its *Consumer Law Handbook*. Most recently, the Center has published comprehensive *Model Residential Utility Service Regulations* which have been used by legal services attorneys and state regulatory agencies.

The Center's interest in the action before the Court is the product of our substantial work in this area and our recognition that poor consumers are directly affected by the summary termination practices of utility corporations throughout the United States. The poor, unemployed, underemployed, elderly, and disabled frequently face the harsh impact and life threatening hazard which results from summary termination of utility service. They are not able to take advantage of the pay now—sue later remedy which is available to more affluent consumers. Without the procedural safeguards mandated by the Fourteenth Amendment, they are left to needlessly suffer loss of a necessity of life where termination is the result of error, mistake, or arbitrary conduct.

The Center offers a perspective which is not available from the parties to this action. Since 1969, we have engaged in significant litigation and legislative development

in consumer protection generally and in the due process implications of summary termination of residential utility service in particular. The national scope of our program has brought an experience with the issues before the Court which enables us to suggest practical resolution of this matter. Moreover, we have direct experience with the action before the Court, having participated in the appeal before the third circuit.

The National Consumer Law Center therefore submits that it has a significant interest in the action before this Court and an experience which enables it to present a brief *Amicus Curiae* which will aid the Court in its deliberations.

Respectfully submitted,

/s/ Richard A. Hesse
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Attorneys for the National Consumer Law Center, Inc.

26 April 1974

Pursuant to Rule 42 of the Rules of the Supreme Court, Advocates For Basic Legal Equality, Inc. (ABLE) and the Ohio State Legal Services Association also apply to the Court for leave to file the enclosed brief *Amicus Curiae* in support of the Petitioner, Catherine Jackson.

ABLE is a *private*, nonprofit legal services program serving the Toledo area. Its attorneys have represented the class plaintiffs in *Palmer* v. *Columbia Gas of Ohio, Inc.*, 342 F. Supp. 241 (N.D. Ohio W.D. 1972), 479 F.2d 153 (6 Cir. 1973), a residential utility service termination action which has raised issues similar to those before this Court. Ohio State Legal Services Association is a statewide legal services program which has appeared as *Amicus Curiae* before the court of appeals in *Palmer* v. *Columbia Gas* and has been substantially involved in judicial and administrative litigation to apply procedural safeguards to residential utility service.

Given their direct involvement with issues similar to those before the Court, ABLE and the Ohio State Legal Services Association have a significant interest in the action before this Court and an experience which enables these programs to present a brief *Amicus Curiae* which will aid the Court in its deliberations.

Respectfully submitted,

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STATEMENT OF THE ISSUE

At issue here is the asserted right to prior notice and opportunity to contest a proposed termination of residential utility service. Petitioner claims that residential utility service is a property interest and entitlement to a necessity of life which, by law, must be extended to all consumers subject only to reasonable conditions of eligibility and payment. And where, as in the Commonwealth of Pennsylvania, that service is provided by a utility corporation which is engaged in a public function, subject to substantial regulatory control, joint beneficiary of a state created monopoly, and required to conform its service and termination practices to a statutory standard of reasonableness and regulatory review, the state's involvement is of such substance as to subject the corporation's affairs to the Fourteenth Amendment. Acting under color of law, the corporation cannot, therefore, terminate residential utility service without compliance with minimum requisites of due process of law.

STATEMENT OF THE CASE

Petitioner Catherine Jackson brought an action under the Civil Rights Act, 42 U.S.C. § 1983, on behalf of herself and all others similarly situated against the Respondent Metropolitan Edison Company, a regulated Pennsylvania utility corporation. Seeking damages, injunctive, and declaratory relief, Petitioner has challenged the corporation's practice of summary termination of residential utility service upon its allegation of nonpayment, abuse, fraud, or tampering and without notice of and opportunity to contest. Petitioner asserts that this challenged termination procedure, pursuant to the corporation's *Electric Tariff No. 41*, fails to comply with the requisites of procedural due process of law under the Four-

teenth Amendment to the Constitution of the United States.

The district court dismissed the complaint for failure to state a cause of action under the Civil Rights Act. Characterizing the challenged practice as the product of internal corporate action without specific authorization by the Commonwealth of Pennsylvania, the court ruled that Metropolitan Edison does not act under color of law. 348 F. Supp. 954 (M.D. Pa. 1972).

On appeal to the third circuit, Petitioner objected to the district court's narrow analysis of the issue of state action. Petitioner argued that government is not neutral where a utility corporation is engaged in a public function, subject to substantial regulatory control, beneficiary of a state authorized monopoly, and required by statute to conform its service and termination practices to a statutory standard of reasonableness and regulatory review. Nor is government neutral where it is a direct economic beneficiary of a utility corporation's business practices. And government is not neutral where its grant of monopoly status creates substantial economic advantage to the corporation and denies alternative sources of residential utility service to consumers.

Upon review, the court of appeals ignored these indices of action under color of law and affirmed the decision below. 483 F.2d 754 (3d Cir. 1973). It viewed government action as limited solely to a regulatory requirement that Metropolitan Edison file its internal tariff regulations with the Public Utility Commission. 483 F.2d at 758. The court also rejected Petitioner's argument that residential utility service is a protected property interest to which the fundamental safeguards of the Fourteenth Amendment apply. It therefore dismissed Petitioner's claim as *de minimus* and of no concern to the federal judiciary.

SUMMARY OF THE ARGUMENT

Under contemporary conditions and in our highly technological society, light, heat, power, water, and communications services are prime necessities of life, any one of which may affect health, livelihood, and life itself. Yet summary termination of residential utility service annually affects countless thousands of residential utility consumers throughout the United States. The practice is characterized by impersonal bureaucracy, computer error, inefficiency, and unresponsiveness. Its failure of procedural safeguard and simple fairness leads to erroneous, mistaken, and arbitrary denial of service to those citizens who can least afford this loss. The result is life-threatening hazard to those who cannot afford the 'pay now—sue later' remedy suggested by the court of appeals in this case.

Utility corporations have largely avoided procedural safeguards in the past because they have been uncritically defined as private businesses. Now, however, it is urged that these public enterprises are not private corporations in the ordinary sense of the term. A multi dimensional analysis of the indices of state action defined by this Court demonstrates that the private label is an unwarranted shield against the Fourteenth Amendment's requirement of fair dealing.

In the case before the Court, it is noted first that Metropolitan Edison is a state created, protected, and controlled monopoly. This government monopoly represents a relationship between the state and corporation which cannot be compartmentalized as private or public; indeed, the two are merged in fact. And this merger results in an identity of purpose and conduct and a mutual economic advantage from which neither public nor private can be separated. *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961).

Monopoly also results in restricted access enforced by the state. It differs from the mere license found in *Moose Lodge 107* v. *Irvis*, 407 U.S. 163 (1972), in that the direct and immediate result of government's creation of the monopoly is a complete denial of alternative sources of utility service. The Commonwealth of Pennsylvania has put the weight of its authority behind the practices of a single corporation and has transformed what in the market economy is a mere refusal to deal into an absolute denial of a necessity of life. Therefore, its monopoly has legitimized, facilitated, and given the force and effect of law to that denial.

Beyond the fact of monopoly, state action is apparent in the pervasive regulation of every significant aspect of Metropolitan Edison's business. Moreover, there is specific statutory—regulatory authorization for the summary termination practices contested here. Finally, there is the fact that the corporation is engaged in a public function in providing residential utility service in behalf of the Commonwealth of Pennsylvania.

The conclusion which follows from this collective assessment is inescapable. Metropolitan Edison is not a private business in the ordinary sense. As a government created, protected, and controlled monopoly, it is joined with the Commonwealth to carry out a public purpose for public benefit. It acts under color of law. It is therefore held to the mandate of due process of law. *Fuentes* v. *Shevin*, 407 U.S. 67 (1972).

I. THE PURPOSE OF THIS LITIGATION IS TO ATTAIN PRACTICAL DUE PROCESS SAFEGUARDS FOR THOSE CONSUMERS WHO FACE ERRONEOUS, MISTAKEN, OR ARBITRARY DENIAL OF RESIDENTIAL UTILITY SERVICE

The following letter was sent to the Hartford Gas Company in February 1891.

Dear Sirs:

> Some day you will move me almost to the verge of irritation by your chuckle-headed Goddamned fashion of shutting your Goddamned gas off without giving any notice to your Goddamned parishioners. Several times you have come within an ace of smothering half of this household in their beds and blowing up the other half by this idiotic, not to say criminal, custom of yours. And it has happened again today. Haven't you a telephone?
>
> Ys. S.L. Clemens
>
> —Mark Twain's Notebook, (Harper & Row)

A. Summary Termination Of Residential Utility Service Is An Issue Of National Scope

As the foregoing reference to Mark Twain indicates, summary termination is an historical issue. It is also a problem of national scope which annually affects many thousands of residential customers of utility corporations. The summary termination remedy has, until recently, been a universal practice of public utilities throughout the United States. It is dictated by a corporate concern for protection of assets. It is characterized by impersonal bureaucracy held together by computers, where inefficiency and a high level of error are the norm and unresponsiveness the only remedy. Yet its failure of procedural safeguard and simple fairness leads to erroneous, mistaken, and arbitrary denials of utility service to those who can least afford this loss.

Amicus urges the Court's attention to the scope of the issues presented here. Summary denial of utility services is an issue which extends far beyond the Petitioner or the class of 300,000 consumers whom she represents. It is an issue of societal import.

In Toledo, for example, a utility corporation serving 140,000 customer accounts issued 120,000 - 140,000 shut-off notices annually. Of these, 6,000 (4% of the corporation's accounts) resulted in termination. The court of appeals described the utility's collection and termination procedures as far worse than imperfect and characterized the results of those procedures as having a potential for tragedy. *Palmer* v. *Columbia Gas of Ohio, Inc.*, 479 F.2d 153, 158 (6th Cir. 1973). Typical of the experiences cited by the court of appeals is that of a father of seven children who pleaded with a collections employee to restore his utility heating service which had been terminated after full payment of the account. The employee responded, "Tough. Pay the bill again." *Palmer* at 158. The temperature in the man's home reached 45° before intervention of an influential community representative caused restoration of the service. Other customers of the corporation suffered termination in the face of disputed accounts, current accounts, admittedly erroneous billing, and even accounts which had been paid in full. Only the intervention of ministers and important community persons seemed capable of gaining restoration of service to some of these consumers.

Adopting the district court's evaluation of the utility's practices, the court of appeals concluded:

> The evidence as a whole revealed a rather shockingly callous and impersonal attitude upon the part of the defendant, which relied uncritically upon its computer, located in a distant city, and the far from infallible clerks who served it, and paid no attention to the notorious uncertainties of the postal service. *Palmer* at 158.

In New York City, Consolidated Edison's collection and termination practice has been described by the district court as a bizarre "Orwellian nightmare". There, a 76 year old widow, upset at a sudden and drastic increase in the amount of her electric bill, caused an investigation to be made which resulted in the discovery by the utility company that her landlord had diverted current through her meter. Nevertheless, the higher bills continued for six months at which time her service was terminated for refusal to pay the excess amount. After living in the dark for three weeks, she obtained emergency assistance from the welfare department and paid the bill. However, Consolidated Edison lost the check, re-entered the deficit upon her account, and again threatened to terminate her service. *Bronson* v. *Consolidated Edison Co. of New York, Inc.*, 350 F. Supp. 443, 444, 445 (S.D.N.Y. 1972). Thereupon, she obtained counsel and sought injunctive relief against the corporation. So shoddy was Consolidated Edison's accounting, however, that, in defense, it asserted no record of the plaintiff as a customer. *Bronson* at 445.

In Atlanta, a municipal water utility terminated service to a tenant who refused to pay his slum landlord's delinquent account even though the tenant offered to pay for all current and future service to his residence. *Davis* v. *Weir*, 328 F. Supp. 317, 318 (N.D. Ga. 1971), 359 F. Supp. 1023 (1973). In St. Paul, San Francisco, Presque Isle (Maine), and Boston, tenants were similarly terminated without warning or notice because of landlord failure to pay delinquent accounts. *See Jackson* v. *Northern States Power Co.*, 343 F. Supp. 265 (D. Minn. 1972); *Freeman* v. *Frye*, Civil No. C-72-350 (N.D. Calif. 31 Oct. 1972); Proceedings before Public Utilities Commission, State of Maine, *Proposed General Order 36* (Jan.

1974); *Hanrihan* v. *Boston Edison Co.*, Civil No. 72-3900T (D. Mass., filed Jan. 1973).

In Denver, a husband and wife faced summary termination at their new residence because of an arrearage at their former residence which had admittedly resulted from the utility's metering error. The customers offered to pay the arrearage in instalments while continuing to pay their current account in full. The offer was rejected; they were told to "pay or else"; and their service was terminated. *Hattell* v. *Public Service Co. of Colorado*, 350 F. Supp. 240, 241 (D. Colo. 1972).

In Milwaukee, where the Wisconsin Electric Power Company annually terminates 10,000 accounts for alleged nonpayment (2% of its 600,000 accounts), a customer who disputed a billing charge of $9.89 faced termination of his residential service without having been afforded the opportunity for impartial hearing to contest that charge. *Lucas* v. *Wisconsin Electric Power Co.*, 466 F.2d 638 (7th Cir. 1972).

The actions described here are typical of the numerous judicial and administrative cases which have litigated the collection and termination practices of utility corporations throughout the United States during the past five years. Without question, these cases demonstrate that the issue of erroneous, mistaken, and arbitrary termination is of societal scope. These cases demonstrate also that utility corporations, in their singular dedication to the balance sheet, have ignored both the rule of fundamental fairness and the harsh impact of summary termination.

B. Procedural Safeguards Are Necessary To Protect This Necessity Of Life

Because summary collection and termination practices are directed at the poor, the severe consequences of denial of utility services are often unnoticed in the larger society. *See generally* Shelton, *The Shutoff of Utility Services for Nonpayment: A Plight of the Poor*, 46 Wash. L. Rev. 745, 748-752 (1971). Those who have not lived under the threat of termination dismiss the fact of termination as if loss of service were of little more consequence than loss of a 50 cent lottery ticket. *See* opinion below at 759. Until some dramatic event such as this winter's exposure deaths thrusts reality to the fore, we fail to recognize that loss of residential utility service is an absolutely life threatening hazard to the poor, disabled, unemployed, and those of modest income who cannot afford the 'pay now—sue later' remedy suggested by the court of appeals. *See* opinion below at 760.

Under contemporary conditions and in our highly technological society, light, heat, power, water, and communication services are prime necessities of life, any one of which may affect health, livelihood, and life itself. The loss of telephone service, for example, is a threat to life for an elderly person who relies upon his telephone to reach emergency medical assistance. Similarly, the loss of electrical service is a harrowing and frightening experience to a widow in New York City. And the loss of heat is a threat to health and life for a mother and her two children who face illness and exposure after termination of that service.

Were utility service a mere consumer convenience, necessary for proper operation of televisions and frost-free refrigerators, the termination practices of Metropolitan Edison would not be challenged before this Court. That, however, is not the case.

> The evidence leaves no doubt whatever that the consequences of shutting off gas service inflicts hardships upon the consumer that far transcend the loss of driving privileges, *Bell* v. *Burson*, 402 U.S. 535 90 (1971), delay in paying unemployment compensation, *California Dept. of Human Resources Devel-*

opment v. *Java*, 402 U.S. 121 (1971), or even the denial of direct relief payments, *Goldberg* v. *Kelly*, 397 U.S. 263 (1970). A person can freeze to death or die of pneumonia much more quickly than he can starve to death. *Palmer* v. *Columbia Gas of Ohio, Inc.*, 342 F. Supp. 241, 244 (N.D. Ohio W.D. 1972).

This winter's energy shortages have confirmed our society's real dependence upon utility services. A highly technological society simply cannot revert to a nineteenth century lifestyle of kerosene lanterns and wood burning fireplaces. Indeed, a shortfall of 12% has resulted in a severe economic downturn, loss of 250,000 jobs, and substantial hardship to many Americans. Contrasting this shortfall with the complete loss and denial which results from termination of utility services, it is apparent that loss of residential utility service is loss of a necessity of life and a life threatening hazard. It is apparent also that utility service should not be denied without safeguards to consumers.

C. Practical Safeguards Are Not Subversive Of Private Business

> The right to public utility services may not rank with the franchise, or with procedural due process in criminal cases, on a conventional scale of liberties, but to the poor or disadvantaged nothing may be more immediately important than fair treatment by those who supply the needs of their daily existence. William F. Eich, Chairman, Public Service Commission of Wisconsin, *Public Power* 32 (Nov. 1973).

The safeguards advocated here are nothing more than practical implementation of our historic commitment to fundamental fairness and the rule of law. Due process attempts only to protect consumers from mistaken, erroneous, or arbitrary denial of utility services. Contrary to the rhetoric of utility corporations, due process is not a radical effort to bankrupt private business. *See*, in this

regard, the argument of Consolidated Edison in *Bronson*, 350 F. Supp. at 448. Nor is it a naive, unworkable attempt to institutionalize the Fourteenth Amendment mandate of fairness.

In the first instance, the cost of due process is not likely to bankrupt utility corporations because it is a cost of service which can be borne by consumers through the rate structure. *See* Bonbright, *PRINCIPLES OF PUBLIC UTILITY RATES* 66 (1961). Nor is due process a radical concept except insofar as fair dealing is a noval concept for many utility corporations. And due process is not an attack upon the legitimate freedom of private business. The state created, state protected, and state regulated monopoly is not a traditional private business in the open market. At best, a utility corporation is a hybrid, more akin to a government authority than it is to a competitive private business in the market economy. Therefore, the utility's use of a private business label should not shield it from the mandate of the Fourteenth Amendment.

Finally, due process is not an unworkable concept. Its practicality is readily demonstrated in those jurisdictions which are implementing a variety of review and hearing procedures for residential utility service consumers. *See generally Massachusetts Department of Public Utilities Regulation*, DPU No. 16696; *Michigan Public Service Commission Regulations Governing Consumer And Billing Practices* (1974); *New York Public Service Commission Opinion No. 73-16* (9 May 1973); *Vermont Public Service Board General Order 57* (1974); *City of Youngstown Health Department Water Service Regulations* (1973). *See also* the relief directed by the court in *Palmer* v. *Columbia Gas*, Civil No. (72-14, N.D. Ohio, W.D., Memorandum and Order, 5 April 1974), and the Model Regulations drafted by *Amicus*. *Model Residential Utility Service Regulations* (National Consumer Law

Center, Inc., Boston, 1974). Most comprehensive of these are the Michigan, Vermont, and Model Regulations which provide a right to informal review and impartial hearing *prior* to termination of service.

II. A PUBLIC UTILITY CORPORATION WHICH IS A JOINT BENEFICIARY OF A GOVERNMENT CREATED, PROTECTED, AND CONTROLLED MONOPOLY; ENGAGED IN A PUBLIC FUNCTION; SUBJECT TO SUBSTANTIAL REGULATION; AND REQUIRED TO CONFORM ITS PRACTICES TO AN AFFIRMATIVE STATUTORY STANDARD OF REASONABLENESS ACTS UNDER COLOR OF LAW WHERE IT TERMINATES RESIDENTIAL UTILITY SERVICE WITHOUT PRIOR NOTICE AND OPPORTUNITY TO BE HEARD

A. The Issue Of Action Under Color Of Law Requires A Comprehensive, Multi-Dimensional Analysis Of The Scope, Extent, And Substance Of Government Involvement With Challenged Practices

Although the opinion below first suggests adoption of the broad, flexible, and comprehensive approach mandated by *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 722 (1961), the court of appeals has, in fact, embraced a narrow, fixed concept of action under color of law. Following a similar decision in *Lucas* v. *Wisconsin Electric Power Co.*, 466 F.2d 638, 655 (7th Cir., 1972), its opinion focuses upon a one dimensional index, that of specific governmental authorization for and direction of the challenged practices of Metropolitan Edison. Yet even there, when faced with a statute which clearly satisfies that index, the court dismisses it as a mere notice filing requirement which does not clothe the utility's termination tariff with the force and effect of law. 483 F.2d at 758. *See* hereinbelow at Part II B 3.

More importantly, perhaps, the court's approach overlooks several additional and significant indices which demonstrate state action in this case. It dismisses the monopoly position of Metropolitan Edison without question as to the significance of the Commonwealth of Pennsylvania's creation, protection, and control of that monopoly. Similarly, it dismisses the fact of mutual economic benefit which is conferred upon the utility corporation and the Commonwealth by statute. It does not recognize the pervasive regulatory scheme which necessarily involves the state of the challenged practices of Metropolitan Edison. And it ignores the fact that the utility corporation is engaged in a public function. In short, the court of appeals has eschewed the multi dimensional approach of *Burton* and has dismissed or ignored these several indices of state action which are relevant to its inquiry.

The issue of action under color of law is not so limited as the court of appeals would have it. There is no singular test or index which is to be applied to consumer due process actions. Rather, state action is a function of a range of factors which collectively demonstrate the scope, extent, and substance of government involvement with participation in, and relation to challenged practices. This is the rule of *Burton* and its most recent restatement, *Moose Lodge 107* v. *Irvis*, 407 U.S. 163, 172 (1972). *See also United States* v. *Guest*, 383 U.S. 715, 723-725 (1966). And among the recognized factors which are relevant to this action are monopoly and economic interdependence, *Burton*, *Moose Lodge;* substantial regulation, *American Communication Assn. C.I.O.* v. *Douds*, 339 U.S. 382 (1950), *Public Utilities Commission* v. *Pollak*, 343 U.S. 451 (1952); direct governmental authorization or encouragement for challenged conduct, *Pollak*, *Evans* v. *Newton*, 382 U.S. 296 (1966), *Reitman* v. *Mulkey*, 387 U.S. 369 (1967); and public function or

governmental purpose, *Marsh* v. *Alabama*, 326 U.S. 501 (1946), *Burton*.

The courts of appeals' approach is clearly inconsistent with the decisions of this Court. The opinion below declines comprehensive consideration of every variable which is relevant to the issue of the termination practices of Metropolitan Edison. Had the court given substantive review to each of the indices set forth herein, it would have been compelled to the conclusion that the involvement of the Commonwealth constitutes action under color of law and therefore subjects Metropolitan Edison to the Fourteenth Amendment requirement of fairness and due process of law.

B. A Comprehensive Analysis Of State Action Should Consider The Relevance And Collective Significance Of Monopoly, Mutual Economic Benefit, Substantial Regulation, Statutory Authorization, And Public Function

Notwithstanding the private business label which the court of appeals has seized as a shield for Metropolitan Edison, it is evident that substance belies both the label and the shield. Simply stated, Metropolitan Edison is not a private business in the ordinary meaning of that term. It is, rather, a government monopoly engaged in the public function. It shares a structural and economic interdependence with the Commonwealth of Pennsylvania and is largely controlled and protected from competition and financial loss by the Commonwealth of Pennsylvania. Moreover, it is pervasively regulated in every significant aspect of its business. In short, neither the utility corporation nor government can be separated, one from the other. Therefore, the residential termination practice of Metropolitan Edison carries the force and effect of law rather than the mere economic force and effect of a private corporate act. It is action under color of law.

1. *Metropolitan Edison And The Commonwealth Act As Joint Participants In And As Joint Economic Beneficiaries Of A Government Monopoly*

Metropolitan Edison was chartered and issued a certificate of convenience, in the first instance, to serve the public interest rather than the private interests of its incorporators. Unlike the private corporation, it exists solely at the will of government. 66 P.S. § 1171. Unlike the private corporation, it holds an exclusive franchise within its service area and is not subject to competition and the private controls of the market economy. 66 P.S. §§ 1121 *et seq.* Unlike the private corporation, it is guaranteed a fair rate of return by the state's regulatory rate structure. 66 P.S. §§ 1141-1148. Unlike the private corporation, it functions under pervasive statutory and regulatory controls which far exceed those to which private business is subject.

Private capital, competition, and influence govern the open market and distinguish private action from government action. These private controls further distinguish the market economy from the closed market in which a public utility operates. It is government which has established the closed market, which controls access to and operation in the market, which substantially regulates it, and which is the source of economic influence in the market. Moreover, it is government's grant of monopoly, rather than private investment, which is the basic source of a utility's existence, funding, and profitability in that market. The utility monopoly thus represents a basic restructuring of the market from private to government control.

This government monopoly may be viewed as analogous to a municipal utility, government corporation, or government authority. Each of these functions in a closed, government market. In each, it is the government charter, franchise, or monopoly which is the source of the

entity's existence. While each may be the object of substantial private investment, that investment is predicated upon the entity's possession of an exclusive charter, franchise, or monopoly. And to the extent that government is the source of the entity's existence and control, its actions are the actions of government where fundamental rights are at issue. *See*, for example, *Meredith* v. *Allen County War Memorial Commission*, 398 F.2d 33, 35 (6th Cir. 1968) [county hospital]; *Holmes* v. *New York City Housing Authority*, 398 F.2d 262, 265 (2d Cir. 1968 [public housing authority]; *Davis* v. *Weir*, *supra*, 328 F. Supp. at 321 [municipal utility].

At the very least, the government monopoly represents a relationship between the state and corporation which cannot be compartmentalized as private or public; indeed, the two are merged in fact. *See Stanford* v. *Gas Service Co.*, 346 F. Supp. 717, 721-722 (D. Kan. 1972); *Bronson* v. *Consolidated Edison*, 350 F. Supp. at 445; *Ihrke* v. *Northern States Power Co.*, 459 F.2d 566, 569-570 (8th Cir. 1972). This merger results in an identity of purpose and conduct from which neither public nor private can be separated. It could not be otherwise; given the aversion to monopoly in American law, a monopoly lawfully exists not as a private business but only to the extent that it is subject to public control and acts for a public purpose. Therefore, the act of the utility corporation is the act of the state, for government "has so far insinuated itself into a position of interdependence with the [corporation] that it must be recognized as a joint participant in the challenged activity, which on that account cannot be considered to have been so purely private as to fall without the scope of the Fourteenth Amendment". *Burton*, 365 U.S. at 275.

Beyond this interdependence, there is a further, perhaps more significant result which rises from the fact of government monopoly, that of restricted access enforced

by the state. Monopoly differs from the mere license found in *Moose Lodge* in that the direct and immediate result of government's creation of the monopoly is a complete denial of alternative sources of utility service. In contrast to the finding in *Moose Lodge*, Catherine Jackson has no opportunity to take her business elsewhere. The Commonwealth has put the weight of its authority behind the practices of a single corporation and has transformed what in the market economy is a mere refusal to deal into an absolute denial of a necessity of life. *Moose Lodge*, 407 U.S. at 177. Its monopoly has legitimized, facilitated, and given the force and effect of law to that denial. The exercise of the state created power to effect that denial is therefore action under color of law. Its arbitrary exercise is a denial of due process of law.

Finally, it should be noted that this government monopoly also generates mutual economic advantage to the corporation and the state. The benefit to Metropolitan Edison is apparent in its exclusive franchise and guaranteed fair rate of return. 66 P.S. §§ 1121, 1122, 1123, 1141, *et seq.* Unlike the private business, Metropolitan Edison is not subject to vagaries of the open market. Insulated from competition and the risk of a market economy, it is the beneficiary of substantial economic advantage in the form of a favorable balance sheet assured by government. Similarly, the advantage to the Commonwealth is undeniable. Not only does the state receive the substantial benefit of general corporate income taxes levied upon utilities, but, more importantly, the Commonwealth is the direct beneficiary of special tax revenues from the gross receipts tax which is levied *exclusively* upon public utility corporations. 72 P.S. § 8101.

The court of appeals has erred in ignoring the significance of monopoly and economic benefit. This Court's

decisions have attributed prime importance to these indices of public action. The lower court's dismissal of these factors as unrelated to the issue of the Commonwealth's relation to challenged conduct cannot stand in the face of *Burton*, 365 U.S. at 723, 724, and *Moose Lodge*, 407 U.S. at 174, 177. *See also Ihrke* v. *Northern States Power Co.*, 459 F.2d at 568, 569. The interdependence evidenced by monopoly and economic advantage is action under color of law.

2. *Government Is Directly Involved Where The Utility's Termination Tariff Has Been Framed Pursuant To A State Standard Of Reasonableness And Is Subject To State Review, Authorization, And Approval*

The court of appeals held that Metropolitan Edison's termination procedure is merely the product of internal corporate action without acquiescence of or authorization by the Commonwealth of Pennsylvania. The only state involvement found by the court is a Public Utility Commission regulation, *Tariff Reg. No. VIII*, which requires utility corporations to set forth the conditions of service termination for nonpayment of accounts. This requirement, the court ruled, is not sufficient state involvement to satisfy the state action requirement. 483 F.2d at 758.

Tariff Reg. No. VIII, however, is not the only state regulation to be considered here. Not only has the court ignored the fact of pervasive regulation, but it has overlooked specific statutory authorization for the challenged practice. The Public Utility Code, 66 P.S. § 1171, state *inter alia*:

> Subject to the provisions of this act and the regulations or orders of the [Public Utility] Commission, every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service . . . .

Together with filing requirements of *Tariff Reg. No. VIII*, this statute subjects utility regulations governing conditions of service and termination to the regulatory authority of the Public Utility Commission. It requires the utility to adopt regulations acceptable to and to be approved by the commission. It mandates a *statutory* standard of reasonableness. It subjects the corporation's regulations to the enforcement and compliance authority of the commission. 66 P.S. §§ 1341, 1343, 1347.

Pursuant to section 1171, Metropolitan Edison has promulgated *Electric Tariff No. 41* which provides its unchecked authority to terminate utility service for alleged nonpayment, abuse, fraud, or tampering. This tariff has been formally presented to the Public Utility Commission under its requirements governing submission of proposed tariffs. *Tariff Reg. Nos. I, II.* And, it has been accepted and approved pursuant to the affirmative statutory requirement, 66 P.S. § 1342, which directs the commission to enforce all provisions of the Public Utility Code, including the reasonableness standard of section 1171.

It is evident that section 1171 directly and significantly involves the Commonwealth with the challenged practices. The statutory provision goes far beyond the simple notice-filing requirement of *Tariff Reg. No. VIII* cited by the court: the Public Utility Commission is to define the standard of reasonableness; it is to review proposed regulations; it is to accept or reject these regulations. Once having required, reviewed, accepted, and approved the challenged tariff, the commission has vested *Tariff No. 41* with the apparent authority of the Commonwealth and clothed the termination practice with the legitimacy of law and an authority which could not otherwise be exercised apart from compliance with sections 1171, 1342 and *Tariff Reg. Nos. I, II.* Therefore, the tariff is no less an index of specific authorization than

was the termination statute recognized in *Palmer* v. *Columbia Gas*, 342 F. Supp. at 245, or the regulatory agency's approval in *Pollak*.

> [W]hen authority derives in part from government's thumb on the scales, the exercise of that power becomes closely akin, in some respects to its exercise by government itself. *Public Utilities Commission* v. *Pollak*, 343 U.S. 451, 462, n.8 (1952).

Compare Moose Lodge, 407 U.S. at 175, where there was no direct or specific governmental authorization for the discriminatory conduct of the private club. In that case, the Commonwealth's involvement was limited to a general licensing requirement.

It may be argued in rebuttal that the commission has not formally ratified Metropoliton Edison's *Tariff No. 41* and therefore has not specifically approved its substance. That argument is without merit. The commission is under a statutory mandate to review proposed tariffs for compliance with section 1171. 66 P.S. §§ 1341, 1342. Whether the review is a formal or informal process is irrelevant to the issue of specific authorization. Certainly, there exists no rule which would have the issue of specific authorization turn on a distinction between formal and informal review. It is enough that the tariff has been submitted, as required, for review and approval. Not having been rejected formally or otherwise, the tariff is in effect and carries the approval and authority of the Commonwealth as a tariff which meets the statutory standard of reasonableness. Without that approval and authority, it would have no force and effect and could not serve as justification for Metropolitan Edison's termination practices.

3. *Government Is Directly Involved In The Challenged Practices Of The Monopoly Which It Pervasively Regulates*

Metropolitan Edison is not the typical business entity which is subject to some regulation by the state. Rather, its general managerial function is subject to substantial governmental intervention and control by statute, administrative regulation, and the Public Utility Commission. Subject to statutory regulation under the Public Utility Code are its rates, 66 P.S. §§ 1141 *et seq.*; services and facilities, 66 P.S. §§ 1171 *et seq.*; termination of service, 66 P.S. § 1171; accounting and budgetary matters, 66 P.S. §§ 1211 *et seq.*; securities and obligations, 66 P.S. §§ 1241 *et seq.*; relations with affiliated interests, 66 P.S. §§ 1271 *et seq.* Subject to administrative regulation by the Public Utility Commission are its tariffs, deposits, service charges, payment and termination procedures, discounts, complaints, records, systems operation, testing, electric cooperative associations, accounts and records. 66 P.S. §§ 452 *et seq.*; 66 P.S. §§ 1341 *et seq.*; *Pennsylvania Public Utility Rules And Regulations Governing Matters Pertaining To Tariffs (1962)*; *Pennsylvania Publice Utility Commission Electric Regulations (1968)*.

Government intervention and control of Metropolitan Edison is nothing short of pervasive. The corporation cannot operate or transact any business as a public utility without statutory authorization. Every significant part of its business as a utility is subject to comprehensive statutory and administrative regulation which reaches well beyond that to which a business corporation in the open market is subject. And broad enforcement authority is granted to the Public Utility Commission to compel corporate compliance with the Public Utility Code and regulations. 66 P.S. §§ 452 *et seq.*; 66 P.S. §§ 1341 *et seq.*; 66 P.S. §§ 1491 *et seq.*

This Court has repeatedly recognized close regulation as a primary index of action under color of law. When the state is "entwined in the management or control" of an entity or where that entity derives power from the state's regulatory intervention, it remains subject to the restraints of the Fourteenth Amendment. *Evans* v. *Newton*, 382 U.S. 296, 301 (1966); *American Communications Assn. C.I.O.* v. *Douds*, 339 U.S. 401 (1950). *See also Public Utilities Commission* v. *Pollak*, 343 U.S. at 462.

Similarly, several federal courts have adopted pervasive regulation as a key factor in the determination of action under color of law. Notably, the Court of Appeals for the Eighth Circuit has applied this index to a utility corporation's termination practices. *Ihrke* v. *Northern States Power Co.*, 459 F.2d at 568. That court adopted the concurring opinion in *Kadlec* v. *Illinois Bell Telephone Co.*, 407 F.2d 624 (7th Cir. 1969):

> [I]t may be possible to demonstrate that a privately-owned publicly-regulated utility or carrier or similar entity has a sufficient nexus with or dependence on a state as to make some of its actions under color of law. Some of the factors which should be considered are whether (1) the entity is subject to close regulation by a statutorily-created body, (2) the regulations filed with the regulatory body are required to be filed as a condition of the entity's operation, (3) the regulations must be approved by the regulatory body to be effective, (4) the entity is given a total or partial monopoly by the regulatory body, (5) the regulatory body controls the rates charged and/or specific services offered by the entity, (6) the actions of the entity are subject to review by the regulatory body, and (7) the regulation permits the entity to perform acts which it may not otherwise perform without violating state law. There may be other factors to be considered besides those here enumerated. The enumeration here of particular factors means that less than all may be sufficient to show

> color of law in some cases and that nothing less than all may be required in other cases. Each case will depend on its facts. 407 F.2d at 628. *See also Palmer* v. *Columbia Gas*, 342 F. Supp. at 245; *Stanford* v. *Gas Service Co.*, 346 F. Supp. 717, 721, 722 (D. Kan. 1972); *Bronson* v. *Consolidated Edison Co.*, 350 F. Supp. at 445, 446; *McQueen* v. *Drucker*, 438 F.2d 781, 784-785 (1st Cir. 1971).

Metropolitan Edison meets the substantial regulation prerequisites suggested by the concurring opinion in *Kadlec* and adopted by *Ihrke* and related cases: (1) the corporation is subject to close regulation by the Public Utility Commission; (2) the corporation must file its regulations with the Public Utility Commission as a condition of operation, 66 P.S. §§ 1142, 1171; (3) these regulations must be approved by the Public Utility Commission to be effective, 66 P.S. § 1171; (4) the corporation is the beneficiary of a state granted monopoly in its service area, 66 P.S. §§ 1121 *et seq.*; (5) the corporation's rates and services are controlled by the Public Utility Commission, 66 P.S. §§ 1141 *et seq.*; (6) the corporation's activities are subject to review by the Public Utility Commission, 66 P.S. § 1171; (7) the corporation is permitted to engage in business as a public utility and monopoly which it could not undertake without government authorization.

The opinion below dismisses the fact of pervasive regulation as insufficient to link the Commonwealth to the conduct of Metropolitan Edison. The error in the court's judgment is its failure to consider substantial regulation in the context of a range of variables which collectively demonstrate state action. Substantial regulation does not stand alone. In particular, the combination of government regulation, government monopoly, and specific authorization is the direct nexus between the state and what otherwise might be private conduct. Here it can be said that the fact of regulation, monopoly, and

specific authorization is such governmental intervention as to make joint venturers of the state and the utility. *Moose Lodge*, 407 U.S. at 177. Again, there is that interdependence and identity which cannot separate private from public.

4. *Government Is Directly Involved In The Business Of A Regulated Utility Corporation Which Is Engaged In A Public Function*

In contemporary society, government has assumed increasing responsibility for provision of basic services to the community. Among these are utility services which, because of cost, technology, or the like, are not generally available to the public without intervention of the state. Often government has undertaken to provide these basic services through its own resources as in the case of a municipal utility or a state chartered utility authority. Alternatively, the state may charter a corporation to provide these services through a certificate of convenience. In either case, the utility is engaged in a public service and is subject to government regulation and control.

When the state has made the political determination to provide, control, or regulate a basic service, it is that decision which defines a public function and gives rise to state action. It is that decision which marks the transformation from private business to public purpose. "That is to say, when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations." *Evans* v. *Newton*, 382 U.S. 296, 299 (1966). *See also Marsh* v. *Alabama*, 326 U.S. 501 (1946).

This public function rule is not simply the creation of recent American law. Its origin lies in our common law tradition where, historically, the state exercised a regulatory function over those businesses and professions

which supplied scarce goods and services to the community. Those who provided such goods and services, whether tradesmen, physicians, innkeepers, or ferrymen, were held to a common law standard of fundamental fairness. *See* Note, *Constitutional Safeguards For Public Utility Customers: Power To The People*, 48 N.Y.U. L. Rev. 492, 495-597 (1973); Ilardi, *The Right To a Hearing Prior To Termination of Utility Services*, 22 Buffalo L. Rev. 1057, 1061-1068 (1973).

Regulation of businesses engaged in public services was carried over in American law, *Munn* v. *Illinois*, 94 U.S. 113 (1876), and is apparent in regulatory control of public utilities which has been in effect from an early period of our history. *See* Note, *supra*, 48 N.Y.U. L. Rev. at 497; Bonbright, *supra* at 5-7. It is demonstrated also in numerous judicial opinions which have held that regulated utilities are affected with a public purpose and are therefore held to a standard of fundamental fairness, now recognized as due process of law. *Columbo* v. *Pennsylvania Public Utility Commission*, 159 Pa. Super. 483, 48 A.2d 59 (1946); *Ihrke* v. *Northern States Power Co.*, 459 F.2d at 569; *Palmer* v. *Columbia Gas*, 479 F.2d at 165; *Davis* v. *Weir*, 328 F.Supp. at 321; *Stanford* v. *Gas Service Co.*, 346 F. Supp. at 722; *Bronson* v. *Consolidated Edison Co.*; 350 F. Supp. at 446.

It is clear that Metropolitan Edison falls within the public function index of action under color of law. The Commonwealth of Pennsylvania has assumed responsibility for provision of electric utility service. It has granted a certificate of convenience to Metropolitan which requires the corporation to serve a clear public purpose. It subjects the corporation to extensive regulation and requires compliance with a statutory standard of reasonableness. It has designated Metropolitan Edison as its exclusive agent in York County and requires the corporation to serve 300,000 residents in behalf of the Commonwealth.

C. A Comprehensive Analysis Demonstrates Action Under Color Of Law In This Case

This multi dimensional analysis demonstrates the substantial participation, relation, and involvement of the Commonwealth of Pennsylvania in the challenged practices of Metropolitan Edison. Every recognized index of state action is satisfied in substantial fashion by an interdependence and joint venture which is born of monopoly, pervasive regulation, and the specific authorization of *Tariff No. 41*. These are bolstered by mutual economic advantage to the corporation and the state as well as by the corporation's engagement in a public function for the public benefit and in behalf of the Commonwealth.

The conclusion which follows from this collective assessment in inescapable. Metropolitan Edison is not a private business in the ordinary sense. It is joined with government to carry out a public purpose. It acts under color of law and is therefore held to the mandate of due process of law in the termination of residential utility service.

III. A UTILITY CORPORATION WHICH TERMINATES RESIDENTIAL UTILITY SERVICE UNDER COLOR OF LAW IS REQUIRED BY THE FOURTEENTH AMENDMENT TO PROVIDE NOTICE AND OPPORTUNITY FOR IMPARTIAL EVIDENTIARY HEARING PRIOR TO TERMINATION

As noted at Part I, the purpose of this litigation is to attain practical due process safeguards for those consumers who face erroneous, mistaken, or arbitrary denial of residential utility service. This is nothing more than implementation of our historic commitment to fundamental fairness and the rule of law; it follows from recognition of residential utility service as a protected property interest which is subject to those procedural safeguards mandated for entitlements to necessities of life.

And to make practical implementation of this mandate, *Amicus* advocates a substantive, pretermination notice requirement coupled with a right to informal company review of disputed issues and a right to impartial review before the regulatory agency.

A. Utility Service Is A Property Interest And Entitlement To A Necessity Of Life Emcompassed Within The Fourteenth Amendment's Protection

> [Due process], unlike some legal rules is not a technical conception with a fixed content unrelated to time, place, and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, "due process" cannot be imprisoned within the treacherous limits of any formula. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 162 (1950) [Frankfurter, J., concurring].

Recognizing that much of the wealth in this nation takes the form of government granted entitlements, this Court has rejected a narrow application of due process. While noting that subsidies, broadcast licenses, utility certificates of convenience, tax exemptions, public assistance, and unemployment compensation do not fall within traditional common law concepts of property, the Court has nevertheless applied Fourteenth Amendment protection to all such interests. *See generally Goldberg* v. *Kelly*, 397 U.S. 254, 262, n.8 (1970); *Bell* v. *Burson*, 402 U.S. 535 (1971).

> The Fourteenth Amendment's protection of "property", however, has never been interpreted to safeguard only the rights of undisputed ownership. Rather, it has been read broadly to extend protection to any significant property interest, *Boddie* v. *Connecticut*, 401 U.S. 371, 379 (1971), including statu-

tory entitlements. *Fuentes* v. *Shevin*, 407 U.S. 67, 86 (1972).

Residential utility service is within this broad protection. In the first instance, it is a necessity of high, fixed cost which cannot be deferred. See the report of the Washington Center for Metropolitan Studies, *Let Them Freeze In The Dark* (1974) 7-8, where it is noted that poor families pay in excess of 7% of income for utility services while upper income families pay as much as 2%. Where such a large part of income must be paid for a necessary service, it cannot be denied that a significant property is at issue. Moreover, utility service is an entitlement required by the Commonwealth to be provided to all consumers, subject only to reasonable, nondiscriminatory regulations governing eligibility and payment. 66 P.S. §§ 1123, 1171, 1172. Like public assistance, licenses, or certificates of convenience, it is a property interest subject to the Fourteenth Amendment and has been so recognized by federal courts. *See*, for example, *Palmer* v. *Columbia Gas*, 342 F. Supp. at 244, 479 F.2d at 165; *Stanford* v. *Gas Service Co.*, 346 F. Supp. at 719; *Bronson* v. *Consolidated Edison Co.*, 350 F. Supp. at 447. As such, residential utility service cannot be terminated without due process of law.

B. Due Process Of Law Requires Notice And Opportunity To Contest Prior To Termination Of Utility Service

> For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard, and in order that they may enjoy that right they must be notified." *Baldwin* v. *Hale*, 68 U.S. 233 . . . . If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. *Fuentes* v. *Shevin*, 407 U.S. at 80.

This definitive declaration affirms the basic principle that due process of law requires prior notice and opportunity to be heard. Time and again, this rule has been stated and applied to all significant property interests, whether characterized as traditional property forms or entitlements. "[I]t needs no extended argument to conclude that absent notice and a prior hearing . . . this prejudgment . . . procedure violates the fundamental principles of due process." *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, 341, 342 (1969). "[O]nly a pretermination evidentiary hearing provides that recipient with procedural due process." *Goldberg* v. *Kelly*, 397 U.S. at 539. "[The] root requirement [of due process is] that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest . . . ." *Boddie* v. *Connecticut*, 401 U.S. at 379.

To the extent that entitlement to utility service is a significant property interest, therefore, this Court's decisions clearly require notice and opportunity to contest prior to termination.

> [N]o later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occured. "This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone." *Fuentes* v. *Shevin*, 407 U.S. at 82.

Reaching a contrary conclusion on the question of the substance of due process, the court of appeals has legitimized a pay now—sue later remedy, citing *Flora* v. *U.S.*, 362 U.S. 145 (1960) as its authority. That decision, however, is inapposite because it involves tax collection, a matter frequently recognized as within the extraordinary situation exception to the prior hearing rule. *Fuentes*, 407 U.S. at 90-92, n.24. To apply this exception, there must be a showing that summary seizure or denial of property is directly necessary to secure an important gov-

ernmental or general public interest; that there is special need for prompt action; and that the person initiating the seizure is a government officer who determines, within a narrowly drawn statute, that summary seizure or denial is justified in a subjective instance. Thus, while summary seizure may be appropriate to collect the internal revenue of the United States, it is not justified in the residential utility context where there is no important government interest to be served, no special need, and no government officer to determine the need for summary termination. And no justification was offered or attempted below. Therefore, the court of appeals' conclusion is simply error.

C. Metropolitan Edison's Termination Practice Fails The Basic Requisites Of Due Process

Metropolitan Edison's termination practice is set forth in its *Electric Tariff No. 41*, a general statement of the corporation's unchecked right to terminate residential utility service upon its allegation of nonpayment and after "reasonable notice". This Tariff provides no procedural safeguards to the consumer, yet it has been justified by the court of appeals as consistent with a pay now—sue later approach to due process of law. *Jackson*, 483 F.2d at 763. It requires little inquiry to conclude that *Tariff No. 41* does not meet the basic requisites of due process.

The termination practice absolutely fails due process in that there is no notice of the right to contest. While the utility does give notice of its intention to terminate service, that notice is but a threat and no notice whatsoever in the sense of due process of law. *Mullane* v. *Hanover Bank and Trust Co.*, 339 U.S. 306, 315 (1949); *Armstrong* v. *Manzo*, 380 U.S. 545, 550 (1965).

> The company's shut-off notice does not provide the customer with the information he needs to quickly and intelligently take available steps to prevent the threatened termination of service. No mention is made in the notice of the fact that a dispute concerning the amount due might be resolved through discussion with representatives of the company . . . . The single reference to making "satisfactory arrangements" cannot be construed as informing a customer of his right to continued service pending a hearing if he disputes the accuracy of the bill or the propriety of the shut-off notice. [T]he notice does not inform the customer of any rights whatever. In short, the company's termination notice is, in the context of constitutional law, virtually no notice at all. "But when notice is a person's due, process which is a mere gesture is not due process." *Mullane*, 339 U.S. at 315. *Palmer* v. *Columbia Gas*, 479 F.2d at 166.

The termination practice further fails due process in that there is no prior opportunity to contest of which the corporation might give notice in the first instance.

Although there appears to be an inhouse investigative process for review of consumer complaints, it is so informal that consumers are not notified of its existence. Nor are Metropolitan Edison's collections employees required to refer disputed issues to this review process. Nor are consumers afforded an opportunity to participate in the investigation. And in no case does the consumer have a right to this review, limited though it is. Moreover, the consumer has no right to continued service pending the review.

In short, Metropolitan Edison's termination practice cannot comport with the most elementary notion of due process of law. It is a practice which is governed by a singular concern for protection of assets, which is premised upon a patronizing benevolence, which assumes the consumer's liability, and which ignores the rule of fundamental fairness. That is not due process of law.

CONCLUSION

Amicus urges that the judgment of the court of appeals is error. Metropolitan Edison acts under color of law and should be held to the mandate of the Fourteenth Amendment. The decision below should be reversed.

Respectfully submitted,

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26 April 1974

IN THE

Supreme Court of the United States

October Term, 1978
No. 78-5845

CATHERINE JACKSON, On behalf of herself and all others similarly situated,

Petitioner,

vs.

METROPOLITAN EDISON COMPANY, a Pennsylvania corporation,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae for the Legal Aid Society of Alameda County, the Legal Aid Society of Orange County, and the Legal Aid Society of San Diego

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IN THE

Supreme Court of the United States

October Term, 1974
No. 73-5845

CATHERINE JACKSON, on behalf of herself and all others similarly situated,

Petitioner,

vs.

METROPOLITAN EDISON COMPANY, a Pennsylvania corporation,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Motion for Leave to File Brief Amicus Curiae.

The Legal Aid Foundation of Long Beach, the Legal Aid Society of Alameda County, and the Legal Aid Society of San Diego hereby respectfully move the Court for leave to file the attached brief *amicus curiae* in support of the petitioner, Catherine Jackson. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondent was requested but refused.

The Legal Aid Foundation of Long Beach, the Legal Aid Society of Alameda County, and the Legal Aid Society of San Diego are organizations established for the purpose of furnishing free legal services to those residents of southern Los Angeles, Alameda, and San

Diego counties who are unable to afford the services of private attorneys. Staff attorneys of these legal services programs have had extensive experience in representing clients who have been subjected to utility termination procedures similar to those employed by the respondent, Metropolitan Edison Company.

Additionally, attorneys for movants are extremely familiar with the "state action" and "due process" issues posed in the instant case. They are currently counsel of record in *Adams v. Southern California First National Bank* and *Hampton v. The Bank of California*, ... F. 2d ...., Nos. 72-1484, 72-1888 (Oct. 4, 1973), *petition for rehearing denied*, ... F. 2d .... (9th Cir. Mar. 12, 1974). These cases challenge the constitutional validity of California's Uniform Commercial Code provisions which authorize and govern a secured party's repossession of property without notice and an opportunity to be heard.

At the invitation of the United States Court of Appeals for the Ninth Circuit, counsel filed a brief *amicus curiae* and presented the oral argument for appellants in *Ouzts v. Maryland National Insurance Company*, 470 F. 2d 790 (1972), *vacated for rehearing en banc*, No. 26062 (9th Cir. June 20, 1973). The "state action" issue in *Ouzts* concerns whether bail bondsmen, empowered by the state to arrest an alleged fugitive and return him for trial, act "under color of law."

Movant legal services projects have also been heavily involved in *Adams v. Department of Motor Vehicles*, ... Cal. 3d ...., No. SAC 7959 (April 10, 1974), invalidating in part California's extrajudicial garageman's labor and materials lien and sale procedure (*See also, Quebec v. Bud's Auto Service*, No. 2 Civ. 41502 (May

10, 1973), *rehearing granted* (June 1, 1973)); and *Kruger v. Wells Fargo Bank*, No. S.F. 23014, *petition for hearing granted* (Cal. Sup. Ct. May 23, 1973), challenging California's extrajudicial banker's lien procedure.

Thus, as demonstrated by the varied situations cited above, involving the conduct of ostensibly private parties, the decision herein may have a substantial impact on a wide range of cases affecting low income persons in which movants are currently involved.

Movants seek leave to file a brief *amicus curiae* which presents a single comprehensive principle of state action. This principle should provide guidance to the Court in the disposition of this case as well as being instructive in a wide range of related cases now pending in lower courts. No such comprehensive view or principle of state action was presented in the Court of Appeals by the parties or *amici curiae* in the instant case; nor do movants believe that such a view will be presented by the parties in this Court.

Respectfully submitted,

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Attorneys for Amici Curiae.

Of Counsel:
ANTHONY G. AMSTERDAM.

April 22, 1974.

IN THE

Supreme Court of the United States

October Term, 1974
No. 73-5845

CATHERINE JACKSON, on behalf of herself and all others similarly situated,

Petitioner,

vs.

METROPOLITAN EDISON COMPANY, a Pennsylvania corporation,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Brief Amicus Curiae for the Legal Aid Foundation of Long Beach, the Legal Aid Society of Alameda County, and the Legal Aid Society of San Diego.

This brief as *amici curiae,* in support of the position of the petitioner, Catherine Jackson, is filed by the Legal Aid Foundation of Long Beach, the Legal Aid Society of Alameda County, and the Legal Aid Society of San Diego, on motion for leave to file said brief, as provided for in Rule 42 of the Rules of this Court.

Interests of Amici Curiae.

The interests of *amici curiae* are set forth in full in the attached Motion for Leave to File Brief Amicus Curiae.

Summary of Argument.

In this action, brought pursuant to 42 U.S.C. §1983, the issue of state action is presented in the context of a publicly regulated utility company's unilateral decision to terminate a customer's electrical utility service without notice and an opportunity to be heard. The threshold question is whether respondent utility company acted under color of law and within the ambit of the Fourteenth Amendment.

To analyze this issue, *amici* present a single comprehensive state action principle that is derived from prior decisions of this Court. This principle may be stated as:

> State action is present where significant governmental interests are promoted by a pattern of regulation delegating state power to ostensibly private persons who then act with the force of law.

An examination of the regulatory scheme involved in the instant case reveals that Pennsylvania has intertwined state policies with the operation of the so-called private utility company and its specific conduct challenged herein. Thus, when the comprehensive state action principle is applied to the instant case, a finding of state action is required.

Statement of the Issue Presented.

In a series of recent cases involving procedural due process, this Court has continually stated that except in the most extraordinary situations, a meaningful opportunity to be heard must be provided *before* a person may be deprived of a protected property interest. *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Bell v. Burson*, 402 U.S. 535 (1971); *Wisconsin v. Constantineau*, 400

U.S. 433 (1971); *Goldberg v. Kelly*, 397 U.S. 254, (1970); *Sniadach v. Family Finance Corporation*, 395 U.S. 337 (1969). This case presents the prior hearing issue in terms of a publicly regulated utility's unilateral decision to terminate a customer's electrical service. In this action, brought pursuant to 42 U.S.C. §1983,[1] the threshold question is whether the respondent acted "under color of law" and within the ambit of the Fourteenth Amendment.[2] Recognizing that this issue is of paramount importance here as well as in the cases previously cited in *amici's* Motion to File Brief Amicus Curiae, *amici* will confine their brief to a discussion of the state action issue.

Initially, *amici* will set forth a general principle of state action as derived from prior decisions of this Court holding ostensibly private parties subject to the constraints of the Fourteenth Amendment. Then *amici* will demonstrate the applicability of this principle to the factual situation presented in the case at bar.

---

[1]42 U.S.C. §1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."

[2]The "under color of" state law requirement of 42 U.S.C. §1983 and the "state action" requirement of the Fourteenth Amendment have been construed to be of the same breadth and scope. *United States v. Price*, 383 U.S. 787, 794, n. 7 (1965).

ARGUMENT.

I

State Action Is Present Where Significant Governmental Interests Are Promoted by a Pattern of Regulation Delegating State Power to Private Persons Who Then Act With the Force of Law.

The Fourteenth Amendment is designed to protect individuals from state action, whether overt or covert, which deprives them of fundamental rights. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972). The manner in which the state may infuse its policies and interests into objectionable conduct may take differing forms:

> "a state may act through different agencies, either by its legislative, its executive or its judicial authorities; and the prohibitions of the [Fourteenth] Amendment extend to all action of the State . . . , whether it be action by one of these agencies or by another." *Ex Parte Virginia*, 100 U.S. 339, 347 (1879).

By focusing on the state's role in such conduct, this Court has developed an expansive body of state action law subjecting so-called private conduct to constitutional scrutiny.[8]

This expansive trend of decisions has been marked by the Court's reluctance to articulate a single state action formula. Rather, by a process of "sifting facts and weighing circumstances," the Court has sought to evaluate significant state policies and interests that

[8]"Recognizing these concepts as expansive, ['under color of law' and state action] the Supreme Court has persistently refused to permit them to be shriveled by technicalities or to be emasculated by unnatural, artificial interpretations." *Green v. Dumke*, 480 F. 2d 624, 628 (9th Cir. 1973) (footnote omitted).

intrude into private relationships and are reflected in particular conduct. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961); *Reitman v. Mulkey*, 387 U.S. 369 (1967).

The Court has been presented with the state action issue in a variety of factual situations. As a result, the Court has approached this issue in an equally varied manner. *Amici* submit, however, that these seemingly diverse approaches reflect differing emphases of a singular unifying theme:

> State action is present where significant governmental interests are promoted by a pattern of regulation delegating state power to ostensibly private persons who then act with the force of law.

This theme is apparent in each of the following approaches employed by the Court:

1. Private parties who are clothed with state authority and act with the force of law. *United States v. Williams*, 341 U.S. 97 (1950); *United States v. Price*, 383 U.S. 787 (1965); *United States v. Guest*, 383 U.S. 745 (1965); *Griffin v. Maryland*, 378 U.S. 130 (1964).

2. Private parties whose conduct is subject to pervasive state regulation. *Public Utilities Comm'n v. Pollak*, 343 U.S. 451 (1952); *Burton v. Wilmington Parking Authority, supra; Moose Lodge No. 107 v. Irvis supra; Smith v. Allwright*, 321 U.S. 649 (1944); *Terry v. Adams*, 345 U.S. 461 (1953); *Nixon v. Condon*, 286 U.S. 73 (1932).

3. Private action encouraged or compelled by state law and reflecting current state policy. *Reitman v. Mulkey, supra; Adickes v. S. H. Kress & Company*, 398

U.S. 144 (1970); *Moose Lodge No. 107 v. Irvis, supra; Peterson v. City of Greenville,* 373 U.S. 244 (1963); *Lombard v. State of Louisiana,* 373 U.S. 267 (1963); *Robinson v. Florida,* 378 U.S. 153 (1964); *Nixon v. Condon, supra; McCabe v. Atchison, Topeka & Santa Fe R. Company,* 235 U.S. 151 (1914); *Evans v. Abney,* 396 U.S. 435 (1970); *Shelley v. Kraemer,* 334 U.S. 1 (1948).

4. Private action taken with reliance on state law, custom or usage. *Adickes v. Kress, supra; Evans v. Abney, supra.*

5. Private action involving the performance of traditional public functions delegated to private individuals. *Smith v. Allwright, supra; Terry v. Adams, supra; Nixon v. Condon, supra; Evans v. Newton,* 382 U.S. 296 (1966); *Marsh v. Alabama,* 326 U.S. 502 (1946).

6. Governmental action placing monopoly power in the hands of private entities to promote state policies. *Railway Employes' Dept. v. Hanson,* 351 U.S. 225 (1956); *International Ass'n of Machinists v. Street,* 367 U.S. 740 (1961); *Lathrop v. Donahue,* 367 U.S. 830 (1961)[4]; *cf. Steele v. Louisville & N. Ry.,* 323 U.S. 192 (1944); *American Communications Ass'n v. Douds,* 339 U.S. 382 (1950).

In essence, the Court has evaluated the pervasiveness of state intrusion into the quasi-private relationship and assessed the state interests reflected in the objectionable conduct. The Court's characterization of the state action issue in the foregoing cases demonstrates an attempt to identify particular state interests in variant circumstances. Thus, the linchpin of the Court's analysis, although expressed in differing forms, contains a principled view of state action. Where this principle is operative, state action exists.

[4]*See Lavoie v. Bigwood,* 457 F. 2d 713 (1st Cir. 1972), for the "monopoly" characterization of these Supreme Court cases.

A closer review of the major decisions finding particular private conduct subject to the constraints of the Fourteenth Amendment illustrates the applicability of this principle.

The existence of a comprehensive state election code reflecting a systematic promotion of the state's discriminatory voting policy was sufficient to support a finding of state action in *Nixon v. Condon, Smith v. Allwright,* and *Terry v. Adams.* In each case, the statute guaranteed that a private political party could determine the qualifications of its members and thereby prohibit Negroes from participating in state primaries or the party's electoral process. Thus, the party was able to employ the state election code to enforce the state's "whites only" voting policy.

Describing the state's intrusion into the structure of private political parties, the Court observed:

> ". . . the statute here in controversy has attempted to confide authority to determine of its [Executive Committee's] own motion the requisites of party membership and in so doing to speak for the party as a whole." *Nixon v. Condon,* 286 U.S. at 85;
>
> ". . . the state [through its election code] endorses, adopts and enforces the discrimination against Negroes . . ." *Smith v. Allwright,* 321 U.S. at 664; and
>
> "It is immaterial that the state does not control that part of this elective process which it leaves for the Jaybirds to manage. The Jaybird primary

has become an integral part, indeed the only effective part, of the elective process that determines who shall rule and govern in the county." *Terry v. Adams*, 345 U.S. at 469.[5]

By legislating the relationship between a private political party and the electorate in such a way as to guarantee the party's unfettered discretion in determining the qualifications of its members, the state: (1) governed the structure of private political parties, (2) delegated specific state functions to a private organization, and (3) enabled the private party to act with the force of law in promoting the state's discriminatory voting policy. Thus, all of the elements of the general state action principle coalesce in these cases.

State action has also been found in a series of cases concerning the regulation of private businesses affairs. In *Peterson v. City of Greenville*, 373 U.S. 244 (1963) and *Lombard v. State of Louisiana*, 373 U.S. 267 (1963), the Court dealt with municipal regulatory schemes[6] governing the relationship between restaurant proprietors and their customers. The delineation of the manner in which restaurant service was to be provided

[5]In *Evans v. Newton*, 382 U.S. 296 (1966) the Court found sufficient "state action" where a city, pursuant to a privately created trust, managed a park which had become a public facility. Mr. Justice Douglas enunciated the Court's rationale:

> ". . . when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations." 382 U.S. at 299.

See also Marsh v. Alabama, 326 U.S. 501 (1946) and *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza*, 391 U.S. 308 (1968).

[6]In *Peterson, supra*, a city ordinance established a detailed scheme for restaurant segregation. In *Lombard, supra*, the statements of public officials were held to be the legal equivalent of an ordinance determining the relationship between a restaurateur and his customers. 373 U.S. at 273.

manifested a distinct state policy favoring segregated eating facilities. As a direct result, restaurateurs structured their business operations so as to refuse service to Negroes. Such intensive control and impact established the prerequisites for state action.

The decision in *Robinson v. Florida*, 378 U.S. 153 (1964) further demonstrates the determinative impact of legislative policies on a particular private business relationship. In *Robinson* the municipal scheme only provided for segregated rest room facilities in restaurants. Relying on this enactment, restaurateurs enforced state policy by providing separate eating facilities for each race. By fashioning his business conduct in accord with the discriminatory policy, the restaurateur acted with the force of law.

In *Reitman v. Mulkey*, 387 U.S. 369 (1967), the United States Supreme Court reviewed a clause in the California Constitution which prohibited restrictions on an individual's right to sell or lease real property to whomever he chose. The Court affirmed decisions of the California Supreme Court[7] finding that the enactment of Proposition 14[8] constituted significant state involvement in private real estate transactions.

In reaching its conclusion, this Court focused on two crucial points: (1) the state had adopted, as current

[7]*Mulkey v. Reitman*, 64 Cal. 2d 529, 413 P. 2d 825, 50 Cal. Rptr. 881 (1966); *Prendergast v. Snyder*, 64 Cal. 2d 877, 413 P. 2d 847, 50 Cal. Rptr. 903 (1966).

[8]Proposition 14, adopted as Article I, §26 of the California Constitution provided that:

> "Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion chooses."

policy, the right of private parties to discriminate in the sale or rental of real estate; (2) that private parties could now invoke state law to accomplish discrimination and were thereby encouraged to do so.

Assessing the ultimate effect or impact of Proposition 14, the Court concluded:

> "The right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government. Those practicing racial discrimination need no longer rely on their personal choice. They could now invoke express constitutional authority, free from censure or interference of any kind from official sources." 387 U.S. at 376, 377.

Thus, the state's intrusion into the private arena so permeated the transaction as to constitute state action.[9]

The Court's decision in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) is fully consistent with the state action principle enunciated herein. In *Moose Lodge*, the Court held that the mere existence of a liquor license did not involve the state in a private club's dis-

[9]*See also McCabe v. Atchison, Topeka & Santa Fe R. Co.*, 235 U.S. 151 (1914), where a state statutory scheme governed the relationship between common carriers and their customers, including the physical construction of railroad cars, in such a way that it injected a state racial policy into the operation of the railroad; and, *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 173-74 (*see* accompanying n. 44) (1970), where the Court held that private parties who act with knowledge of and pursuant to state enforced "custom and usage" (42 U.S.C. §1983) act "under color of" law. As Mr. Justice Brennan stated, concurring in part and dissenting in part, "when private action conforms with state policy, it becomes a manifestation of that policy and is thereby drawn within the ambit of state action." 398 U.S. at 203.

criminatory guest or membership policies. The licensing provisions did not establish a regulated pattern of private conduct in the sale of liquor. Unlike the cases previously discussed, the legislative enactments in *Moose Lodge* in no way governed the discriminatory relationship between the club and the persons to whom it served liquor. Nor did the state in any way delegate its authority to the club in order to accomplish discrimination. The Court noted that a liquor license did not "in any way foster or encourage racial discrimination." 407 U.S. at 176, 177. Thus, the possession of a liquor license had no impact on the private conduct complained of, and could not serve as a basis for a finding of state action.[10]

Although no state action was found on the facts presented in *Moose Lodge*, the Court did reaffirm the basic principle guiding its approach to the state action question. Specifically, the Court indicated that had the regulatory scheme governed a liquor licensee's course of dealing with minorities or promoted a state policy favoring discrimination, then state action would have been present:

> "There is no suggestion in this record that the Pennsylvania statutes and regulations governing the sale of liquor are intended either overtly or covertly to encourage discrimination." 407 U.S. at 175, 176.

The foregoing analysis demonstrates that where significant state interests are implemented through a per-

[10]Likewise in *Evans v. Abney*, 396 U.S. 435 (1970) the statutes authorizing the formation of wills did not clearly promote an identifiable state interest favoring discrimination, nor was there any evidence that the testator was persuaded or induced by the statute to discriminate.

vasive regulatory framework delegating state power to private individuals, the resultant conduct has the force of law and is subject to constitutional scrutiny.

II

The Application of the Principle Developed Herein Requires a Finding of State Action in the Instant Case.

An examination of the regulatory scheme involved in the instant case reveals that Pennsylvania has intertwined state policies with the operation of the so-called private utility company. Through extensive regulation and the state's Public Utility Commission, Pennsylvania has granted the utility a certificate of convenience or franchise and thus a virtual monopoly in an exclusive territory of service. 66 Purden's Pennsylvania Statutes (hereafter "P.S.") §§1121-1123.

The Commission regulates and must approve the rates which the utility charges its customers. 66 P.S. §§1141, 1142, 1149. The Commission is empowered to issue regulations necessary for supervision of utilities, including provisions for inspection and access to facilities and records of the utility. 66 P.S. §§1171, 1182, 1217, 1341, 1342, 1348. Discriminatory practices in rates and services are prohibited and all rules and regulations of the utility are subject to Commission approval. 66 P.S. §§1142, 1144, 1148, 1149, 1171, 1172, 1183, 1342.

The Commission's rate setting procedure requires that the utility must file a tariff with the Commission in compliance with its rules. The Regulation on Tariffs, §VIII, provides that:

> "Every public utility that [imposes] penalties upon its customers for failure to pay bills promptly shall provide in its filed tariffs a rule setting forth clearly the exact circumstances and conditions in which the penalties are imposed . . ." A. 84.

Pursuant to the regulation, the Metropolitan Edison Company filed in Tariff No. 41, its Rule 15 (issued April 30, 1971, effective June 30, 1971):

> "Company reserves the right to discontinue its service on reasonable notice and to remove its equipment in case of non-payment of bills or violations of the Pennsylvania Utility Commission's or Company's rules and regulations; or, without notice, for abuse, fraud, or tampering with the connections, meters, or other equipment of company." A. 46, 84.

Significant governmental interests are promoted by this regulatory scheme. Pennsylvania's citizens are assured of receiving electrical service, which has been characterized as a virtual "necessity of life to most if not all of its customers." *Palmer v. Columbia Gas of Ohio, Inc.*, 479 F. 2d 153, 163 (6th Cir. 1973). Because the utility provides the service, the state has been saved the cost of directly providing electricity while assuring such service at reasonable rates. The lower the operating costs, the lower the rate to the customer. Lower operating costs are achieved by the unilateral termination of services without an evidentiary hearing. Finally, Pennsylvania directly benefits from its Utilities Gross Receipts Tax, 72 P.S. §§8101, *et seq.*, as did the city of St. Paul in *Ihrke v. Northern States Power Co.*, 459 F. 2d 566, 588 (8th Cir.), *vacated as moot*, 409 U.S. 815 (1972): "since the city received 5% of the Northern's gross earnings the city benefited from the payment of bills resulting from Northern's threatening to terminate services."

These state policies are secured through the aforementioned regulatory framework which delegates rule-making power to the utility. The respondent utility company was authorized to, and did in fact, promulgate Tariff No. 41 challenged herein. In short, the Tariff is a public rule which operates with the force of law.

Pennsylvania's comprehensive pattern of regulation delegates specific governmental functions to the utility in furtherance of previously identified state interests. The state has empowered the utility company to act as an arbiter in the settlement of disputes. This function is uniquely governmental. As Mr. Justice Harlan observed in *Boddie v. Connecticut*, 401 U.S. 371, 375 (1971): "It is to courts, or other quasi-judicial bodies, that we ultimately look for implementation of a regularized, orderly process of dispute settlement." Indeed, the state has a "monopoly over techniques for binding conflict resolution. . . ." *Id.* Thus, only through Pennsylvania's transference of a portion of its monopoly power, does the utility derive its power to resolve conflicts.

Not only has the state ceded judicial power to the utility, but the regulatory scheme effectively confers the essentials of police power on the ostensibly private party. This enables the utility to perform a role normally accorded constables, sheriffs and marshals, *i.e.*, execution of judgments.

Thus, when the state abdicates these roles to so-called private persons, in the interest of economy, the functions still retain all of the characteristics of an act of the state. *Evans v. Newton*, 382 U.S. at 299;[11] *cf.*, *United States v. Williams*, 341 U.S. 97 (1950); *United States v. Price*, 383 U.S. 787 (1965); *United States v. Guest*, 383 U.S. 745 (1965).

[11] *See also, Hall v. Garson*, 430 F. 2d 430, 439 (5th Cir. 1970); *Scott v. Vandiver*, 476 F. 2d 238 (4th Cir. 1973).

By virtue of its regulatory scheme, Pennsylvania has created a state sanctioned monopoly with power to legislate rules and practices for its customers. Where government confers the essentials of monopoly or legislative power on private entities to further specific policies, state action is present. In *Railway Employes' Dept. v. Hanson*, 351 U.S. 225 (1956) and *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961), such power was delegated to labor unions by statutes authorizing union shop agreements designating the union as the exclusive bargaining representative. *Cf., Steele v. Louisville & N. Ry.*, 323 U.S. 192, 198 (1944); *American Communications Ass'n v. Douds*, 339 U.S. 382 (1950).[12] In *Hanson*, the Court recognized Congress' apparent desire to obtain "industrial peace and stabilized labor-management relations" (351 U.S. at 234) through union shop agreements.

Similarly, in *Lathrop v. Donahue*, 367 U.S. 820 (1961), required membership in an integrated state bar association, having authority to engage in legislative activity, constituted state action. The Court acknowledged that the state's interest in requiring membership in an integrated bar association, for the purpose of "raising the quality of professional services" was "legitimate". 367 U.S. at 843. Thus, in both instances, governmental placement of monopoly power in the hands of private entities to promote significant interests resulted in a finding of state action.

[12] "But power is never without responsibility. And when authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by the Government itself." 339 U.S. at 401.

In the instant context, Metropolitan Edison Company's delegated monopoly power to dictate the terms and conditions under which it provides electrical services to its customers parallels that possessed by the above-mentioned labor unions and integrated bar association. In each instance, the rules promulgated by the private entity, as they relate to identifiable governmental interests, have the force of law. Indeed, where, as here, the private entity provides a service which is so uniquely "affected with a public interest it ceases to be *juris privati* only." *Munn v. Illinois*, 94 U.S. 113, 126 (1877).

The general state action principle developed and applied herein demonstrates that analysis should focus on the relationship between significant and identifiable state interests and the conduct complained of. Where these interests are intertwined and promoted through particular conduct, state action is present.

Courts of Appeal, in considering whether summary terminations of utility service violate due process, have, by and large, confined their analyses to the question of whether state statutes or regulations expressly authorize said terminations. *But see, Ihrke v. Northern States Power Co.*, 459 F. 2d 566 (8th Cir.), *vacated as moot*, 409 U.S. 815 (1972). Where such specific authorization exists, state action has been found. *Palmer v. Columbia Gas of Ohio, Inc.*, 479 F. 2d 153 (6th Cir. 1973). Where specific authorization is absent, the courts have refused to find state action. *Jackson v. Metropolitan Edison Company*, A. 76-92; *Lucas v. Wisconsin Electric Power Company*, 466 F. 2d 638 (7th Cir. 1972), *cert. denied*, 409 U.S. 1114 (1973). *Amici* submit that the absence of express state statutory or regulatory authorization is not dispositive of the

state action issue.[13] As prior decisions of this Court teach, no one factor or test provides the exclusive answer to this question. *See* pages 8-11, *supra*. Rather, the entire fabric of state interests, regulations, and delegation of power to private entities must be examined. Where examination of this fabric reveals that significant state interests are promoted through particular conduct, then the ostensibly private party acts under color of law and within the ambit of the Fourteenth Amendment.

Conclusion.

For the above-stated reasons, the decision below should be reversed.

Respectfully submitted,

RICHARD A. WEISZ,
STEFAN M. ROSENZWEIG,
MICHAEL B. WEISZ,
Attorneys for Amici Curiae.

Of Counsel:
ANTHONY G. AMSTERDAM.

April 22, 1974.

[13]Where the state affirmatively sanctions the objectionable conduct in the context of a pervasive regulatory scheme, state action is clearly present, as in the paradigm case of *Public Utilities Comm'n v. Pollak*, 343 U.S. 451 (1952).

Service of the within and receipt of a copy thereof is hereby admitted this_____ day of April, A.D. 1974.

_____

_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-5845

CATHERINE JACKSON, On Behalf of Herself and All Others Similarly Situated,

Petitioners,

v.

METROPOLITAN EDISON COMPANY, A Pennsylvania Corporation,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK

The Public Service Commission of the State of New York respectfully moves for leave to file a brief amicus curiae. In support of such motion, the Commission states as follows:

The Public Service Commission of the State of New York is a state agency whose duties include regulating the service obligations of electric, gas, telephone and pri-

vately owned water utilities within the State of New York. Such utilities under New York law as implemented by the Regulations of the Public Service Commission, may terminate service for nonpayment of bills, provided adequate notice of the proposed termination has been given to the consumer and the consumer has been afforded an opportunity to challenge the validity of the unpaid bills prior to the termination of service. In this respect, the Commission has recently promulgated new regulations not only requiring the utilities subject to its authority to codify their own procedures, but has also codified Commission procedures for handling the many complaints lodged with the Commission.

In view of New York's pre-termination of service procedures, which we believe conform to the principles of procedural fairness implicit in any requirements of due process, we have no occasion to address ourselves to the threshold issue presented of whether the respondent utility was acting under color of law within the meaning of 42 U.S.C. 1983. We are, however, concerned that if the Court holds that residential utility services may only be discontinued after compliance with due process procedures, that the specifics of such procedures not be spelled out in this case where the record reflects no consideration of the special problems and factors relating to utility discontinuances.

The respondent utility in this case apparently afforded petitioner no procedure whatsoever for having her bill dispute resolved prior to payment of the disputed bill. Accordingly, acceptance of petitioner's contention would presumably require a remand to give consideration to what procedures may be required. Inasmuch as the specific type of pre-termination procedures can have vital consequences to both utility customers and the utilities, it is important for this Court to adhere in this case to its normal practice of not deciding issues not presented to it.

In this respect, we believe it important for the Court to have some understanding of the issues raised in consumer billing disputes and request permission to file an amicus brief for this purpose.

Respectfully submitted,

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Of Counsel:

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April 5, 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-5845

CATHERINE JACKSON, On Behalf of Herself and All Others Similarly Situated,
Petitioners,

v.

METROPOLITAN EDISON COMPANY,
A Pennsylvania Corporation,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF AMICUS CURIAE ON BEHALF OF THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK

INTEREST OF AMICUS CURIAE

The interest of the amicus curiae is set forth in the Motion to which this Brief is attached.

ARGUMENT

As we point out in our motion for leave to file this brief amicus, public utilities in New York may not dis-

continue service for non-payment of a bill while a customer's challenge of a bill is being considered by the utility and until after there has been subsequent opportunity to complain to the Public Service Commission. In view of our procedures which we believe conform to the principles of due process, we do not have occasion to take a formal position in whether 42 U.S.C. 1983 is applicable or whether termination of utility services must conform to due process. We are concerned, however, that the nature of any due process requirements applicable to such disconnect procedures should not be delineated in a case such as this where the special circumstances relating to utility billing disputes and disconnect procedures have not been fully explored. This brief is essentially limited to this interest.

Preliminarily, we note that the decision below rested in part on the view that utility services are not so vital as to be entitled to the protection of due process procedures before the termination of service for nonpayment of a disputed utility bill. The decision assumed in this respect that challenge of a disputed bill after payment would afford the customer adequate protection. But there is no explanation why a utility should be the stakeholder for any disputed amounts, at least pending appropriate consideration of a billing dispute. While the prompt collection of revenues owed to a utility is important from a public viewpoint since utility rates include allowances both for working capital and uncollectible accounts, these considerations do not compel any conclusion that consumers, whose opportunity to receive utility service is restricted to a single source by governmental action, should not have a meaningful consideration of a billing dispute before service is cut off[1] or that such prepayment procedures would be unduly burdensome.

[1] While expeditious and simple judicial proceedings might in some situations provide such a remedy, the Court below did not rest its decision on a view that the Pennsylvania procedures it described in n. 11, 483 F.2d at 760, afforded such a remedy.

In this respect, the New York Commission implemented new regulations last year to formalize a preexisting practice precluding the discontinuance of service by a utility pending its consideration of a billing dispute.[2] Moreover, service in New York may not thereafter be discontinued until the consumer has an opportunity to contest an adverse utility decision by filing a complaint with the Public Service Commission. The Commission's procedures permit a customer to present his side of a dispute to an impartial officer of the Commission, with the assistance of such persons as he chooses, and have that officer evaluate all material pertinent to the complaint, including such data as the company may be required to furnish so as to permit a reasoned determination. The provisions also afford the consumer an opportunity for a conference-type hearing and a more formal evidentiary-type hearing, if a dispute involves factual issues of a type that cannot reasonably be resolved otherwise.

But, as the Commission explained, *infra*, p. 12, its experience indicates that the informal hearing procedures, which had been utilized in New York for a number of years, can resolve most billing disputes. The great bulk of billing disputes do not involve factual matters where an adjudicatory-type hearing would be useful. For example, the accuracy of meter readings of the meters themselves are best resolved by having Commission inspectors make independent readings or meter tests, as contemplated by the New York statute.

CONCLUSION

This Court has recognized that the nature and type of hearing required by due process will depend upon all

[2] The Commission's opinion promulgating the regulation and pertinent regulations are reproduced in the appendix, *infra*.

relevant circumstances, taking into account the characteristics of the claimants, the nature of the controversies to be resolved, and the interests of those concerned in speedy and simple resolution of the disputes. *E.g.*, *Goldberg* v. *Kelly*, 397 U.S. 254, 267 (1970). Thus, if the Court determines that due process requires an opportunity for a pre-termination of service hearing on a billing dispute, the Court should not, in this case, mandate the specific types of hearing procedures which are required, since the record here indicates no consideration of the special problems and factors pertinent to utility discontinuance procedures.

Respectfully submitted,

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April 5, 1974

APPENDIX

APPENDIX

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on May 2, 1973.

COMMISSIONERS PRESENT:

Joseph C. Swidler, Chairman
Edward P. Larkin
William K. Jones
Carmel Carrington Marr
Harold A. Jerry, Jr.

CASE 26358—In the Matter of Rules and Regulations of the Public Service Commission, 16 NYCRR, in relation to complaint procedures.

OPINION NO. 73-16

OPINION, ORDER AND RESOLUTION ESTABLISHING RULES AND REGULATIONS PERTAINING TO COMPLAINT PROCEDURES

(Issued May 9, 1973)

BY THE COMMISSION:

On December 7, 1972, the Commission issued an order instituting a rulemaking proceeding regarding the manner in which complaints are handled by the Commission and the utilities it regulates. We noted in that order that while the Commission has long provided a forum for the consideration of consumer complaints regarding billing disputes and other aspects of utility operation, it seemed desirable to spell out the applicable procedures

and requirements in published regulations. We also indicated that the availability of such procedures should be publicized more extensively to give greater assurance that consumers will be made aware of their remedies in the event that they are dissatisfied with the utility's service or the handling of a dispute by a utility. The regulations now being adopted implement those purposes. As a result of comments received, the language of the original proposals has been modified substantially.

Notice of the proceeding and copies of the proposed rules were served on each utility or municipality affected thereby, as well as other groups expressing or likely to express a general interest in this matter.[1] In response to our invitation for comment, replies have been filed by the City of New York, the Bronx office of the Legal Aid Society, Consumers Union of United States, Inc., GET Consumer Protection, Inc., several utilities[2] and Leonard Sandweiss, an attorney on his own behalf. Additionally, comments of parties to Case 26158, *Telephone Service Standards*, were reviewed and those which were pertinent to this proceeding were considered in our deliberations.[3]

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[1] Copies were sent to public interest and consumer units, legal aid organizations, community interest and/or civic associations, and governmental units dealing with related problems.

[2] Rochester Gas and Electric Corporation (RG&E), Long Island Lighting Company (LILCO), New York State Electric & Gas Corporation (NYSE&G), Orange and Rockland Utilities, Inc. (O&R), Consolidated Edison Company of New York, Inc. (Con Edison), New York Telephone Company (NYT), Rochester Telephone Corporation (RTC), The Brooklyn Union Gas Company (Brooklyn Union), The St. Lawrence Gas Company, Inc., Long Island Water Corporation, Kingsvale Water Company, Inc. and various affiliates of Continental Telehpone System who filed identical comments.

[3] Among the comments reviewed were those filed by Grassroots Action, Inc., Consumer Assembly of Greater New York, and a joint filing by Harlem Consumer Education Council, Citizens Committee of Inquiry into Government and Business Delinquency and Media Workshop.

By letter dated March 1, 1973, those parties responding to our initial notice were invited to a conference to discuss revisions to the original proposals that the Commission had tentatively approved. As a result of this meeting, which was held at our New York City office on March 16, 1973, several parties filed additional comments.

This process has resulted in our adoption of rules as set forth in the resolutions which accompany this opinion. We have fully considered all of the comments received in response to our rulemaking notice and those offered at the conference. Many of the suggestions submitted were worthy of adoption; others have been considered and rejected as inconsistent with the purpose of the rules. We turn now to a discussion of the provisions we are adopting.

FORM OF COMPLAINT (Section 11.1)

The existing rules state that the Commission requires no particular form of complaint. While we have long accepted complaints made in person at the offices of the Commission or ones communicated by telephone, it seemed desirable to codify this procedure. Accordingly, the notice of proposed rulemaking provided a complaint would not have to be in writing. The City of New York suggested the regulations specify that a telephone complaint would provide a sufficient basis for the Commission to prevent a threatened service cutoff. This suggested modification is in accordance with present practice and the regulations will contain an affirmative statement that a complaint may be initiated by telephone or in person at Commission offices.

New York Telephone Company expressed some reservation about complaints that were not in writing in situations where a formal written reply to the complaint would be required. In such cases, the utilities will be served with at least a written summary of the complaint.

COMMISSION PROCEDURES (Section 11.2)

Section 11.2 of the rules that we are adopting describes the Commission procedures available for the resolution of complaints against utility companies and provides that as a norm discontinuance of service for nonpayment of a bill will be precluded while the Commission has a billing dispute under consideration.

Various comments filed with respect to the rules originally proposed correctly pointed out that those proposals did not clearly indicate the nature of the Commission procedures that would be available with respect to consumer complaints. We agree that the rules should specify the type of procedures that are available to the public and have spelled out such procedures in Section 11.2(b) and (c).

Section 11.2 (b) as adopted here describes the ombudsman-type complaint handling procedure under which most consumer complaints relating to disputed bills, charges, deposits or service problems are handled by the Commission. This provision spells out the right of a utility customer to present his side of a dispute to an impartial officer of the Commission, with the assistance of such persons as he chooses, and to have that officer evaluate all material pertinent to the complaint, including such data as the company may be required to furnish to permit a reasoned determination. The provision also affords an opportunity for a conference-type hearing attended by a Commission complaint officer, the complainant with friends or advisors of his choice and company representatives.

Experience indicates that the procedures described in Section 11.2 (b), which have been employed for a number of years, can effectively resolve most billing disputes. The new rules will, however, spell out more clearly the authority of the Commission's complaint officer to issue a binding directive to the utility. The great bulk of billing disputes do not involve factual matters where an adjudicatory-type hearing would be useful. For example, the accuracy of meter readings, or meters are best resolved by having Commission inspectors make independent readings or meter tests as contemplated by the Statute.[1] In many other situations, disputes are resolved after an independent Commission analysis or explanation of a bill in relation to the applicable rates.

We recognize that in a limited number of situations complaints, including billing disputes, may involve factual issues of a type that cannot reasonably be resolved except through the more formal evidentiary-type hearing described in Section 2.3 of the Commission's existing regulations. In other cases, the nature of the complaint may effectively preclude use of the procedures outlined in Section 11.2(b). Accordingly, Section 11.2(c) specifies that the Commission may call a Section 2.3 hearing where it determines that the procedures of Section 11.2(b) are not applicable to the dispute, or cannot reasonably resolve the issues raised.

With respect to complaints involving billing disputes where discontinuance of service has been threatened, the rules provide that the Commission will call a public hearing where, in the Commission's view, evidentiary issues relating to the dispute cannot reasonably be resolved by the procedures described in Section 11.2(b), unless judicial resolution of the dispute is deemed more appropriate. In this respect, it should be recognized that many disputes are subject to concurrent administrative and judicial jurisdiction. Accordingly, the Commission may find it necessary or desirable to disclaim jurisdiction over a particular dispute because of pending judicial proceedings. While we are reserving the right to decline jurisdiction in some instances requiring full evidentiary hearing in

[1] Public Service Law, Sections 67 and 89(d).

favor of judicial proceedings, such a declination of jurisdiction would not be appropriate where the nature of the complaint or the sums involved would preclude a meaningful avenue of relief in a particular case.

We believe that the provisions of Section 11.2(b) and (c) described above will provide consumers with the type of impartial hearing urged by the consumer groups and the City of New York in their comments, although all of the procedural provisions urged by some of the participants have not been incorporated. The regulations which we adopt are designed to provide consumers with a meaningful opportunity to be heard with respect to disputes with utilities yet retain the necessary flexibility to permit investigation and determination of disputes in a manner appropriate to the circumstances of individual cases.

In its response to the proposed rules which accompanied the rulemaking notice, the City of New York urged that a brief, written decision be provided in all cases stating the basis for the conclusions of the determining officer. We are incorporating the substance of this recommendation, which actually reflects present practice, in the final description of Commission procedures. Written determinations are now routinely provided to complainants in gas, water and electric cases. In the case of communication service billing disputes, which frequently involve very limited portions of a bill, written determinations are not routinely provided since many such disputes are resolved through telephone contacts. However, written determination will be furnished if requested. The second paragraph of Section 11.2(b) of the rules being adopted, together with the explanatory comment, provide for a continuation of the present practice.

As we stated above, the rules being adopted specify in Section 11.2(d) that as a norm the Commission will preclude the shutoff of service while a billing dispute is

under consideration. Indeed, as we observed in the order instituting this proceeding, the major utilities, under a long-standing working arrangement with the staff, have upon request of the staff refrained from discontinuing service for nonpayment of disputed amounts while the billing dispute was under consideration at the Commission. In fact, the filing of billing complaints with the Commission has routinely resulted in a suspension of discontinuance procedures by the utilities. We anticipate a continuation of this routine practice but, in the future, the suspension of discontinuance procedures would plainly be at the direction of the Commission's staff, not simply at its request.

In drafting the rules originally proposed, the provisions for precluding discontinuance of service until a billing dispute had been decided were written in purely discretionary terms without indicating the normal practice that had been described in the explanatory order. Legal Aid argued that such unfettered discretion was unwarranted. We agree. In the final rules, the pertinent provision specifies that the Commission will preclude discontinuance of service during its investigation of a billing complaint, absent a showing of unusual circumstances. Thus, our normal practice will be apparent to anyone reading the rules. But we do not agree with Legal Aid and Consumers Union that the regulations should rigidly preclude discontinuance of service until a complainant has been heard with respect to a billing dispute. The City of New York argued that staying service discontinuance pending resolution of a complaint should be required unless it clearly appeared that the complaint was frivolous or without merit and also recognized such stays should not be automatic under the regulations as to encourage patently unfounded complaints designed merely to delay payment of amounts properly billed. We agree that the rules should preserve some discretion in the Commission in this respect, in large

measure to prevent an abuse of Commission processes. For example, under Section 11.2(d) payments of undisputed portions of a disputed bill may be required by the Commission's staff as a condition for avoiding a cutoff of service.

In the original proposals, the interim relief provision specified that pending resolution of any complaint, the Commission could require appropriate interim relief without hearing or formal order. A number of utilities objected to the breadth of this provision, pointing out that the complaints cover a broad spectrum of complaints other than billing disputes, including rate challenges. While the Commission should be free to fashion interim relief as to all types of complaints, we agree that such relief will not necessarily be appropriate for all complaint situations without hearing or formal order. Accordingly, the rules being adopted indicate the availability of interim relief with respect to all complaints without specifying procedures except as to billing complaints where the discontinuance of service is involved.

It was also suggested by some of the utilities that a complainant should not be able to invoke the Commission complaint procedures until he had sought relief from the utility involved. Our experience indicates that many customer complaints are resolved between the customer and utility and we believe that the practice should be encouraged; however, we think it would be unrealistic to make such a requirement mandatory. The rules will therefore establish appropriate procedures to insure that disputes are resolved in a fair and reasonable manner whether directed to the utility or to the Commission.

UTILITY COMPLAINT HANDLING PROCEDURES

As stated above, we anticipate that most consumer complaints will initially be presented directly to the util-

ity concerned—that, of course, is the most desirable procedure. It is therefore important to insure that utilities establish procedures that will enable dissatisfied customers to obtain meaningful consideration and response from company personnel with respect to complaints directed to them. The rules adopted here, which are very similar to those originally proposed, require that such procedures be developed.

While each utility will be free to fashion procedures adapted to its particular operations, the rules provide some significant guidelines and standards. Thus, company procedures must provide that no discontinuance for nonpayment of a bill for service or a deposit will be made while the company is investigating a consumer's complaint about the bill, although a consumer may be required to pay undisputed portions of a bill. In addition, no notice of discontinuance for nonpayment is to be sent pending such investigation of a billing complaint. If a complaint is plainly repetitive, the procedures would not have to treat it as a new complaint for which discontinuance would have to be stayed. One of the comments received stated that utilities should not only be precluded from discontinuance of service because of a disputed bill, but that they should not be permitted to avoid this result by requiring a deposit on the basis of a disputed bill. We agree and company procedures should so specify.

We also specify that after the utility has completed its investigation and advised the consumer of its determination, the consumer must be afforded a reasonable time to either pay the amount found owing by the company or to invoke the Commission's complaint handling procedures; however, a complete new discontinuance notice is not required. Customers must similarly be provided with a reasonable time to pay prior to a discontinuance where payments are found due as a result of a Commission determination. Where a notice of discon-

tinuance had been sent prior to the company's determination or accompanies its determination, the company must advise the consumer of the availability of the Commission's complaint handling procedures.

A number of questions were raised in comments by the utilities relating to the payment of undisputed portions of disputed bills as related to discontinuance of service. For example, O&R expressed the view that a combination utility should be permitted to require payment of a gas portion of a bill when only the electric bill is in issue and vice versa. We agree and believe that the proposed rules are broad enough to require payment in such a situation. If a discontinuance notice has been sent, it will, however, be incumbent upon the utility to advise a customer of his obligation to pay the portion of a bill as to which there is no dispute and to afford him a reasonable opportunity to pay such undisputed amounts before any attempt is made to discontinue any of the services rendered. We expect the utilities to develop and codify reasonable procedures for such situations, but are not now specifying the form of the notification. If a utility sends a discontinuance notice for nonpayment of an undisputed portion of a bill, its notice should only ask for payment of the undisputed portion of the bill as a condition for retaining service. Additionally, we believe that where a customer obtains more than one utility service from the same company, a customer's failure to pay for one service, while a dispute is pending as to the other service obtained, would warrant discontinuance only for the service for which payment was admittedly due.

NYSE&G suggested that where agreement cannot be reached as to the undisputed portion of the bill, the proposed regulations should allow a utility to require payment of an amount based upon past usage or other relevant facts to enable a customer to avoid discontinuance of service. This proposal would permit utilities to determine unilaterally the "undisputed" portion of a bill. Such a procedure is plainly unacceptable. We recognize, however, that where resolution of billing disputes might require some time, both the customer and the company may be benefited by interim payment of some amount. In such circumstances, the standard suggested by NYSE&G might well provide a guide for how much the consumer would agree to pay in the interim. In addition, the Commission's staff acting under Section 11.2(d) might, in some situations, use such criteria to establish a minimum amount to be paid in order to preclude discontinuance of service.

At the conference, RG&E suggested that the proposed rules be modified to permit the Commission to require an appropriate deposit pending its investigation, as well as to compel the Commission to order payment of current or prior undisputed amounts as a condition to receiving a hold on discontinuance. We reject these suggestions. A deposit is not an appropriate condition to maintain service where a billing dispute exists. Nor is it appropriate for the Commission to lay down a rigid series of preconditions for invoking its authority, although in a given factual situation the payment of clearly undisputed amounts might be a condition for obtaining a stay of service discontinuance.

As noted above, the rules which we adopt will require utilities to provide appropriate notice to the customer regarding its determination of the complaint. Should the investigation conclude that the disputed service was rendered or that the disputed charge is proper, the utility may then require payment. In such a case, if discontinuance of service is or has been threatened, the utility will be required to advise the customer of the availability of the Commission's complaint handling procedures.

This provision was the subject of much controversy between the parties. Consumer representatives in general

would prefer that all discontinuance notices advise customers of Commission complaint handling procedures. We believe that such a course would be unwise since consumers should be encouraged to seek relief from the utility rather than the Commission in the first instance. Inclusion of such advice with every disconnect notice would, we believe, encourage initial resort to the Commission. Since service may not be shut off while the company is considering a complaint and for sufficient time after its determination to permit resort to the Commission, the consumer is afforded reasonable protection. To accomplish this purpose, the disconnect notice should plainly advise customers of the availability of company procedures to consider customer complaints prior to the proposed cutoff. As we stated in the order instituting this proceeding, we construe Section 143.2 of the existing regulations to impose such a requirement. Upon further consideration, we believe it desirable to amend Section 143.2(a)(1)(iv) so that it will more clearly reflect the intended meaning.

Some of the utilities also commented on this section of the proposed rules. New York Telephone Company stated that its business offices receive over 400,000 billing inquiries each month and the company feared, on the basis of the modified proposals circulated prior to the conference, that it might be required to provide formal determinations, containing notice of the availability of Commission procedures in all such cases, even where no service discontinuance was contemplated. The company advises that many of these bill inquiries are resolved quickly to the satisfaction of their customers and rarely do these situations involve threatened suspension of service. Rochester Telephone argues that other provisions of the rules will provide adequate publicity with respect to the Commission's complaint handling procedures and that notice at this stage of a billing dispute is not necessary. We have considered this matter and conclude that the

notice advising customers of the Commission's complaint handling procedures should be provided with the notice of determination in all cases where a notice of discontinuance of service has been sent prior to the company's investigation or is served with the determination. This will insure that consumers faced with possible loss of utility service will be made fully aware of the Commission's complaint handling procedures at a meaningful time. Limiting the advice notice to cases involving possible discontinuance of service will also resolve the very real problems of telephone companies with respect to inquiries regarding toll calls, message units and the like.

Some of the consumer groups argued that the notice period now required by the regulations before service may be discontinued is too short and urged that the period be lengthened to ten days. The matter of the length of the notice period prior to discontinuance was fully considered in Case 26230 and the time period adopted there has been in effect but seven months. We do not believe that a revision of the recently adopted regulations is required at this point.

Rochester Telephone Corporation contended that the waiting period of up to eight days after the company's determination of the complaint before service could be discontinued amounts to an unnecessary delay. We do not agree. It is appropriate to provide consumers with reasonable opportunity to make payment after the company's determination or, where deemed necessary, to seek review of the dispute at the Commission. Nor can we see any reason why telephone companies should be treated differently in this respect than other utilities as is suggested by RTC. With respect to water companies, the notice period prior to discontinuance contained in 16 NYCRR, Section 533.1 is ten days longer than that adopted for other utilities. Since the notices required after the utility's determination of the complaint may

reasonably be treated as a continuation of the original notice, requirement for such notices by water companies will be the same as that for other utilities.

Finally, we will require that utility procedures developed under this section be filed with the Commission for approval. Brooklyn Union and Long Island Water Corporation object to this requirement. Brooklyn Union maintains that the filing of its detailed procedures will eliminate the flexibility it requires to cope with the many different situations which are likely to develop. The company suggests that filing its procedures will seriously hinder its effectiveness in handling complaints and proposes that utilities be allowed to certify compliance with Commission procedures. Long Island Water Corporation considers the requirement unnecessary. We do not agree that filing operational procedures with the Commission will work to eliminate flexibility and hinder any utility's complaint handling system. Moreover, such a provision is necessary to insure compliance with our rules and to assure the public an opportunity to know the applicable procedures.

At the conference, the consumer groups urged that notice of the filing of utility procedures be provided as well as an opportunity for public comment and possible further public participation in the review process. We believe it is desirable that interested persons be given an opportunity to review and comment upon utility complaint procedures submitted to the Commission for approval. Accordingly, we will order utilities to provide a copy of their proposed rules to any person requesting same, and to make copies available for public inspection at company offices. In addition, we will require that companies publish newspaper notices which state that complaint procedures have been filed for review; that such procedures are available for public inspection at designated company offices and offices of the Commission;

and that interested persons may submit comments with respect to the procedures to the Commission. At this time, we believe it is premature to decide if any further conferences or hearings will be required with respect to utility complaint procedures. That decision will be made upon Commission review of the materials submitted by the company and the comments received from the public.

Our original proposal would have required a utility to file proposed changes in its internal complaint procedures with the Commission for review 60 days before the proposed effective date of the changes. Several utilities have suggested that procedural changes will likely be required from time to time as experience is gained in actual practice and that a 60-day period may result in unnecessary inconvenience, unfairness to consumers or needless financial loss to the utility. It was urged that the period be shortened to 30 days. We believe such a modification is appropriate.

PUBLICIZING COMPLAINT PROCEDURES

A number of utilities made comments on the requirement that companies periodically advise customers of the procedures available to register service or billing complaints. NYT and LILCO both indicate their belief that inserts with such information should be mailed annually. NYSE&G maintains that the word "periodic" is too general and that notice once every two years for existing customers would be adequate. Others, such as O&R, Brooklyn Union and Long Island Water, oppose periodic notification on the ground that it may lead to excessive complaints. Kingsvale Water Company asserts that periodic notice would create an unjustified expense for a small company and suggests that notification only be required when service is initiated.

It is important that consumers have adequate knowledge of the availability of complaint handling procedures

and we believe that periodic notification by utilities is required to provide such knowledge. This need outweighs the possibility that receipt of bill inserts of this nature may induce the filing of some unnecessary inquiries or complaints. We have also concluded that such notices should be provided on an annual basis.

New York Telephone also states that companies should be able to spread out the inclusion of bill inserts over several months so that all customers would not receive them at the same time. The proposed rules contemplated such staggering and have not been revised in this respect.

We will also require, as originally proposed, that the opening pages of telephone directories contain a conspicuous notice advising consumers of the availability of the Commission complaint procedures for all utilities. The format of this notice is subject to the approval of the Commission's Director of the Communications Division. LILCO, O&R and Brooklyn Union contend that this provision will encourage consumers to contact the Commission in the first instance. We believe that the wording of the directory notice should indicate that complaints which cannot be resolved by the utilities may be referred to the Commission. Thus, we feel that the notice will not necessarily have the impact anticipated by O&R, LILCO and Brooklyn Union. Rochester Telephone wants to retain sole control over the format and location of the notice in the preliminary pages of its directory. In view of the purpose of this notice, we view our original proposal as sound.

The Commission orders:

1. Each electric, gas, steam, waterworks and telephone corporation subject to the Commission's jurisdiction shall revise or modify its present terms and conditions of service to comply with the requirements of this Opinion and the resolutions adopted this date, and where necessary,

each utility shall file revised tariff schedules prepared in accordance with this Opinion and the resolutions adopted this date within 60 days of the date of this Order.

2. Each electric, gas, steam, waterworks and telephone corporation subject to the Commission's jurisdiction shall file twenty (20) copies of procedures implementing the respective requirements of Sections 143.8, 275.8, 434.8, 533.8 and 631.9 of Title 16 of the New York Code of Rules and Regulations, adopted this date, within 60 days of the date of this Order, and shall file schedules for implementing the respective requirements of Sections 143.9, 275.9, 434.9, 533.9 and 631.10(a) and (b), within 60 days of the date of this Order.

3. Each telephone corporation shall commence incorporating the notice required by Section 631.10(c) in the next directory for which inclusion of such notice is consistent with the closing date of the directory.

4. Each electric, gas, steam, waterworks and telephone corporation subject to the Commission's jurisdiction shall furnish a copy of the procedures filed in accordance with ordering paragraph 2, to any person requesting same, and shall make copies available for public inspection at its offices.

5. Each electric, gas, steam, waterworks and telephone corporation subject to the Commission's jurisdiction shall publish at least once, in a newspaper or newspapers of general circulation within its service territory, notice of the filing of the procedures required by ordering paragraph 2 within seven days of the date of filing. New York Telephone Company, Niagara Mohawk Power Corporation, New York State Electric & Gas Corporation and General Telephone Company of Upstate New York, Inc. shall publish said notice in a newspaper or newspapers of general circulation located in each major population center within their respective service territories. Said

notice shall state that company procedures for handling customer complaints have been filed for review with the Commission, and are available for public inspection at designated company offices and at offices of the Public Service Commission. Further, said notice shall state that interested persons are invited to submit comments with respect to said company complaint handling procedures to the Public Service Commission, 44 Holland Avenue, Albany, New York 12208, within thirty days of the date of filing indicated in the notice.

6. Newspaper publication of the changes in tariff schedules required by ordering paragraph 1 hereof is hereby waived.

7. Except as granted in the foregoing Opinion and in the amendments to Title 16 of the New York Code of Rules and Regulations adopted this date, all suggested modifications, deletions, additions and objections are denied.

8. This proceeding is continued.

By the Commission,
(Signed) SAMUEL R. MADISON
Secretary

[SEAL]

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

RESOLUTION BY THE COMMISSION

(Pursuant to Pub. Serv. L. §§ 4, 20, 66, 71, 72, 80, 84, 85, 89(c), 89(i), 89(j), 92, 94, 96 and 97)

In the Matter of the Rules and Regulations of the Public Service Commission, 16 NYCRR, Chapter I.

At a session of the Public Service Commission held in the City of Albany on May 2, 1973, the Commission by a vote of its members,

RESOLVED:

1. Subchapter B of Chapter I of Title 16 of the New York Code of Rules and Regulations is amended by deleting the present Part 11 and substituting the following:

PART 11
COMPLAINTS—FORM AND PRACTICE

Section 11.1 *Form of Complaint*

The Commission requies no particular form of complaint; an individual consumer's complaint need not be in writing and may be initiated by telephone or in person at the offices of the Commission. A written complaint need not be verified. The following, however, should be furnished in support of a complaint:

(a) The name and address of the complainant or complainants.

(b) The name and address of the person or corporation complained against.

(c) The act or omission complained of, with the approximate date.

(d) What relief has been sought from the person or corporation complained of, and the response, if any, from such person or corporation.

Section 11.2 *Investigation, Hearing and Determination of Complaints*

(a) When a complaint is filed, it will be investigated by the Commission, through its staff, and may be served upon the person or corporation complained against with direction to satisfy the matter complained of or to file its answer thereto.

(b) In most instances, complaints concerning disputed bills, charges, deposits or service problems will be determined by such officers or employees of the Commission as the Chairman designates to act in its place. In exercising this function, the designated officers or employees may obtain the information required to make the necessary determination by conversation with the complainant or his or her representative by telephone or in person, supplemented where appropriate by written materials from the complainant, reports or documents from the utility (including such data as may be required by the staff at the request of the complainant or on its own initiative); through written complaints similarly supplemented; or through a conference conducted by the designated officer or employee at which the complainant, accompanied and assisted by such friend, adviser or attorney as he or she desires, and company representatives are present.

Officers or employees designated to consider complaints will afford both the complainant and the utility a fair and reasonable opportunity to present evidence pertinent to the complaint and to challenge evidence submitted by the other

party to the dispute. The complainant or utility complained of may otbain a written statement of the determination, including a brief reason for the conclusion.

[Comment: In many cases, consumer complaints are resolved to the satisfaction of all parties on the basis of a staff review of the complaint, examination of pertinent company records, and inspection of pertinent company equipment (including metering devices). Staff determinations in cases which appear to be in such a category are, in the first instance, made on the basis of such evidence. To the extent that the initial determination relied on data not previously disclosed, the parties are afforded an opportunity to challenge the evidence relied upon by staff.

Determinations of complaints relating to gas, electric or water billing disputes are, as a standard operating procedure, sent in writing to the complainant. In the case of communication service billing disputes, which frequently relate to only portions of a bill, many disputes are resolved primarily through telephone contacts, though written statements will always be supplied, if requested.]

(c) After receipt of the answer to a complaint, and where the procedures described in section 11.2 (b) are not applicable or cannot reasonably resolve the issues raised by a complaint, the Commission, on its own initiative, the recommendation of staff, or the request of the complainant or the utility, may call a public hearing upon notice utilizing the procedures set forth in section 2.3 of this Title. When evidentiary issues relating to a complaint regarding bills or deposits where discontinuance of service for nonpayment has been threatened cannot, in the Commission's view, reasonably be resolved pursuant to procedures described in section 11.2(b), the

Commission will, except where it determines that judicial resolution of the dispute would be more appropriate, call a public hearing upon notice utilizing the procedures set forth in section 2.3 of this Title.

(d) Pending resolution of complaints, the Commission may require appropriate interim relief. In the case of complaints regarding bills or deposits, the Commission, without hearing or formal order, may, and in the absence of unusual circumstances, will preclude discontinuance of service or the issuance of any notice of discontinuance during the Commission's investigation of such complaint, upon such terms and conditions as it deems appropriate.

[Comment: In implementing this provision, the Commission, for example, may require a customer, as a condition for avoiding a cutoff of service for nonpayment of a bill, to pay the undisputed portion of such a bill or, in appropriate circumstances, to pay such amounts as reasonably appear to reflect the cost of current usage.]

(e) The Chairman may designate such officers or employees as may be necessary to act in place of the Commission in regard to all complaints.

2. The Secretary is directed to file this Resolution with the Secretary of State.

3. A copy of this Resolution shall be filed in Case 26358.

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

RESOLUTION BY THE COMMISSION

(Pursuant to Pub. Serv. L. §§ 4, 20, 66, 71 and 72)

In the Mattter of the Rules and Regulations of the Public Service Commission, 16 NYCRR, Chapter II.

At a session of the Public Service Commission held in the City off Albany on May 2, 1973, the Commission by a vote of its members,

RESOLWED:

1. Part 143 of Subchapter D of Chapter II of Title 16 of the New York Code of Rules and Regulations is amended:

(a) by deleting the present title of Part 143 and substituting the following:

NOTICES OF DISCONTINUANCE AND COMPLAINT PROCEDURES

(b) by deleting the present § 143.2(a)(1)(iv) and substituting the following:

§ 143.2(a)(1)(iv) the availability of company procedures to consider customer complaints prior to discontinuance, including the address and phone number of the office of the electric company the customer may contact in reference to his account; and

(c) by adding at the end the following new sections:
Section 143.8 *Billing Disputes*

(a) Every electric corporation shall establish procedures whereby any complaint filed with such corporation by any customer thereof in regard to any bill

for service rendered or any deposit required will be promptly investigated in an appropriate and fair manner, with the result of such investigation being promptly reported to the complaining customer. Such procedures shall allow the acceptance and processing of complaints submitted in simple manner and form. Regardless of whether a notice of discontinuance has previously been sent, the utility's procedures shall provide that pending the utility's investigation it shall not discontinue service or issue a notice of discontinuance; provided, however, the consumer may be required to pay the undisputed portion of a disputed bill or deposit to prevent discontinuance or the issuance of a notice of discontinuance.

(b) If, after the completion of such an investigation, the utility determines that the disputed service has been rendered, or that the disputed charge or deposit is proper, in whole or in part, the utility may require the full bill or deposit or the appropriate portion thereof to be paid; in such event, appropriate notice of the determination shall be given to the customer, and where notice of discontinuance of service has previously been sent, or is served with the determination, such notice shall include a statement advising the customer of the availability of the Commission's complaint handling procedures. The utility's procedures may provide for discontinuance of service if the customer fails to pay such required amount after receipt of proper notice, provided that a customer's service will not be discontinued until at least five days after notice of the utility's determination, where personal service is made upon the person supplied, or at least eight days after mailing of such a notice; and provided further that no discontinuance may occur if so precluded by the Commission pursuant to section 11.2(d) of this Title.

(c) The utility's procedures shall provide that, where the complaint procedures of the Commission have been invoked and it is determined that the disputed service has been rendered, or that the disputed charge

or deposit is proper, in whole or in part, a customer's service will not be discontinued for failure to pay the amount found appropriate until at least five days' notice of the Commission's determination, where personal service is made upon the person supplied, or at least eight days after mailing of such a notice.

(d) The procedures required to be established under this section shall be filed with the Commission for review. The Commission shall be advised of any substantial changes in such procedures thirty days prior to their proposed implementation to permit Commission review.

Section 143.9 *Publicizing Complaint Procedures*

(a) Every electric corporation shall, by a notice accompanying a regular bill or otherwise, advise each of its customers annually, unless otherwise directed by the Commission, of the procedures available to the customer to register complaints in regard to service or disputed bills. Such notice shall clearly state the means by which a complaint can be made to the Company and shall also advise the customer that, if after contacting the Company the customer remains dissatisfied, he may contact the New York State Public Service Commission. Such notice shall further state that the Public Service Commission has a staff available to give assistance in such matters, and shall also specify an appropriate address of the Public Service Commission.

(b) Prior to circulating the notice required by subdivision (a) of this section, each utility shall submit to the Commission for its approval the form of such notice and the intended program for its distribution.

2. The Secretary is directed to file this Resolution with the Secretary of State.

3. A copy of this Resolution shall be filed in Case 26358.

CORRECTED COPY

Supreme Court, U. S.
FILED
SEP 19 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-5845

CATHERINE JACKSON, On Behalf of Herself and All Others Similarly Situated,

Petitioner,

v.

METROPOLITAN EDISON COMPANY, A Pennsylvania Corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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IN THE

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OCTOBER TERM, 1974

No. 73-5845

CATHERINE JACKSON, On Behalf of Herself and All Others Similarly Situated,

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v.

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

ARGUMENT

I.

PETITIONER HAS STANDING TO BRING THIS ACTION

A. Petitioner is entitled to bring this action because she is the Respondent's customer and is the real party in interest and the intended beneficiary and recipient of the Respondent's services.

In its first argument, Respondent raises the issue of Petitioner's legitimacy to bring this action. This issue

was not raised in the lower courts, nor was it included in Respondent's brief in opposition to the Petition for the Writ of Certiorari.[1] Certainly, the failure of the district court and court of appeals to consider this obvious issue lends support to the apparent lack of significance of such issue.

There is no question that the Petitioner is a proper party to bring this action. Petitioner was the owner, occupant and prior billing party of the premises to which Respondent's electrical services were provided. (A-22). The Respondent was certainly aware of the above and provided service to the Petitioner as the beneficiary of the contract entered into between it and Dodson in September 1971. (A-23). Furthermore, after Dodson moved from the premises, the Respondent considered the Petitioner to be its customer and liable for the bill, as shown by the demand made by the Respondent's employee for $30.00 by the following Monday on October 11, 1971 (A-25). The fact that a written contract was not entered into at this point is irrelevant since Rule 1 of the Respondent's Tariff No. 41 provides that a written contract is not necessary to create a customer relationship (A-38).

In addition to having standing to sue as the customer or intended beneficiary of the service, the Petitioner acquired standing as an occupant with a legal interest in the premises who is also the intended recipient of the services. Thus, Respondent's statement on page 10 of its Brief that the Fourteenth Amendment protections

[1] See Rules 24(2) and 40(1)(d)(2) of the Rules of this Court as to timeliness of arguments.

apply to "persons" and not to "premises" not only appears to reassert the discredited personal v. property rights distinction which was struck down in *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972), but also ignores the reality of the fact that Petitioner's personal rights are being denied by Respondent when it unconstitutionally deprives her of the property right to continued receipt of electrical services during a billing dispute.

To accept Respondent's argument that only the billing party has standing to contest a utility company's termination action is to maintain that a non-billing occupant has no legal interest in receipt of utility service. This position is not only contrary to common sense and to public policy, but is contrary to caselaw.[2] In this regard, since Respondent's challenged tariff requires that notice be provided prior to termination of

[2] In Pennsylvania, an incoming tenant cannot be held responsible for the bills of the former occupant of the premises. *Tyrone Gas and Water Co. v. Public Service Commission*, 77 Pa. Super. 292 (1921). See also, *Beaver Valley Water Co. v. Public Service Commission*, 70 Pa. Super. 621 (1918); *Pa. Chautauqua v. Public Service Commission of Pa.*, 105 Pa. Super. 160 (1932). Similarly, courts have held that a tenant who is the non-billing party, has standing to challenge the termination of utility service to his or her premises without prior notice and opportunity to be heard when the landlord billing party refuses or fails to pay the bill. *Jackson v. Northern States Power Co.*, 343 F. Supp. 265 (D. Minn., 1972); *Davis v. Weir*, 328 F. Supp. 317, 359 F. Supp. 1023 (N.D. Ga., 1971, 1973), affirmed 497 F.2d 139 (5th Cir., 1974) at 145, where the Court noted that the "Department's actions offend not only equal protection of the laws but also due process."

service for nonpayment of a bill, it is submitted that such notice, in order to be meaningful and pass constitutional muster, must be furnished to the occupant of the premises. *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950); *Davis v. Weir*, 328 F. Supp. 317, 359 F. Supp. 1023 (N.D. Ga., 1971, 1973), affirmed 497 F.2d 139 (5th Cir., 1974).

As an occupant with a legal interest in said premises, Petitioner is the customer and real party in interest, with standing to bring this action regardless of whether or not she was the prior billing party.

II.

RESPONDENT'S BRIEF FAILS TO PROVIDE A COMPREHENSIVE ANALYSIS OF THE CUMULATIVE EFFECTS OF THE VARIOUS INDICIA OF STATE ACTION.

A. A multi-dimensional approach is required.

In its brief, and contrary to the rule of *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) and *Moose Lodge 107 v. Irvis*, 407 U.S. 163 (1972), Respondent seeks to avoid a finding of state action by treating the various indices of state action separately and in a vacuum. Rather, Petitioner submits that it is consideration of the cumulative effect of the several indices of state action that is required for a determination that ostensibly private conduct is taken under color of law. Thus, a finding of state action is required when specific governmental interests are

furthered by challenged conduct which is extensively regulated, authorized and approved by the state.

In this case the several indices of state action are integrally related to the conduct challenged. Hence, Respondent's status as a state sanctioned monopoly enables it to threaten to terminate a customer's services without fear of loss of competitive advantage. The fact that Respondent performs a public function in furnishing electrical services furthers the state's interest in assuring the reasonably continuous supply of services at a reasonable price to its citizens. See 66 Pa. Stat. Anno. §1171. The joint participation of the Commonwealth with the Respondent results in mutual benefits to each party, in that the Respondent derives a State guaranteed rate of return and is permitted to operate without significant competition, while the Commonwealth benefits from the efficient operation of the Respondent's activities and receives direct tax revenues therefrom. In addition, the Commonwealth derives an economic benefit when it delegates quasi judicial authority to the Respondent to adjudicate billing disputes and to deprive customers of property. Finally, the Commonwealth regulates and specifically authorizes, encourages, and approves the particular conduct challenged.

The thrust of Respondent's brief is not only to attempt to discredit the Petitioner's argument by isolating the various indices of state action, but also to utilize the "floodgates" argument for its *in terrorem* effect. Respondent implies that a finding of state action herein will result in a complete breakdown of the distinction between essentially private conduct and public action. However, in so doing, Respondent applies

Petitioner's argument out of context in this regard. State action need not be found solely because of state licensing or regulation, but instead, results where, in addition to the above, the conduct challenged promotes state interests and is authorized by the state which acts as a partner in such conduct.[3]

B. The necessary indicia of state action are present in this case so as to require a finding that Respondent acted under color of law when it terminated Petitioner's electrical services.

In its brief, Respondent mistakenly attempts to isolate, distinguish or minimize the importance of the various indicia of state action set forth in Petitioner's brief.

1. The state specifically approved the particular conduct challenged herein because Respondent's proposed termination of service tariff was passed by the Public Utility Commission following public hearings.

On pages 24-25 of its brief, Respondent notes that in 1971 it filed proposed tariffs for a rate increase with

[3] Although failing to find state action where a bank set off an indebtedness against the checking account of a depositor, the First Circuit Court of Appeals noted that there was "little parallel" between a closely regulated bank and a public utility which has been chosen by the state to carry out a specific governmental objective. *Fletcher v. Rhode Island Hospital Trust National Bank*, 496 F.2d 927, 932 (C.A. 1, 1974).

the Public Utility Commission. In its proposed tariff the Respondent included certain of its prior tariffs, including Rule No. 15, the termination of service tariff. Hearings were then held before the Commission from September 30, 1971 to March 10, 1972. The Commission granted a rate increase and did not order a change in Respondent's other regulations.

It is apparent from the above that the Commission considered and gave specific approval to Respondent's termination of service tariff. In *Public Utilities Commission v. Pollak*, 343 U.S. 451 (1952) state action resulted where the District of Columbia Public Utility Commission held hearings and specifically approved the challenged action. Respondent's challenged activity thus falls within the doctrine of *Pollak, supra*, and requires a finding of state action thereunder. *See Moose Lodge 107 v. Irvis, supra.*

2. Respondent performs a public function, which constitutes one index of state action.

Respondent contends that it does not perform a public function because the Commonwealth of Pennsylvania allegedly had no common law duty to furnish utility services to its citizens (Resp. Br., 11). Whether or not the Commonwealth originally had such a duty is immaterial, since, in passing the Public Utility Law, the Commonwealth in fact assumed an obligation to assure that its citizens receive reasonably continuous utility services at reasonable rates. 66 Pa. Stat. Anno. §1141,

§1171.[4] *See also Munn v. Illinois*, 94 U.S. 113 (1877). Furthermore, conduct undertaken pursuant to common law "custom or usage" is certainly state action. *See Adickes v. S.H. Kress Co.*, 398 U.S. 144 (1970); *Reitman v. Mulkey*, 387 U.S. 369 (1967).

In addition to the above noted public function, the Respondent also performs a public function through the exercise of quasi-judicial authority delegated to it by the Commonwealth. Respondent can thus determine the lawfulness of its own regulations, adjudicate disputes between itself and its customers, and effect a seizure of property interests by terminating a customer's electrical services.

3. Pervasive state regulation of the conduct challenged is a significant index of state action.

Respondent charges that the distinction between public and private action will be destroyed if a finding of state action may rest upon the sole fact of a state regulatory scheme in a particular case. (Resp. Br., 14). However, Respondent misstates Petitioner's argument in this regard. Petitioner asserts only that a finding of state action is required where it is found that the state benefits from challenged conduct which it

[4]The cases cited by Respondent in support of its position, predate the enactment of the Public Utility Law. *Girard Life Insurance Co. v. The City of Philadelphia*, 88 Pa. 393 (1879); *Baily v. Philadelphia*, 184 Pa. 594, 39 A. 494 (1898).

regulates, encourages and authorizes.[5] See *Moose Lodge v. Irvis, supra*. Thus, as noted by the district court herein, the state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff, but with "the activity that caused the injury" (A-71). *See also Kadlec v. Illinois Bell Telephone Co.*, 407 F.2d 624 (C.A. 7, 1969) cert. den., 396 U.S. 846 (1969). Certainly, as noted above, the Commonwealth of Pennsylvania is so significantly involved in the Respondent's termination activity as to warrant a finding of state action.

4. Respondent is a monopoly whose challenged activity herein is authorized by and promotes the interests of the Commonwealth of Pennsylvania.

Respondent disputes Petitioner's characterization of it as a "state sanctioned monopoly" (Resp. Br., 15). Certainly, such a characterization cannot now be seriously disputed in view of *Gilmore v. City of*

[5]Hence, the mere fact that a state may regulate restaurants in general would not warrant a finding of state action in a situation involving excessive prices if the challenged prices are not specifically authorized by the state, but might very well warrant a finding of state action in a situation where the state authorizes restaurants to engage in challenged racial discrimination. See *Lombard v. Louisiana*, 373 U.S. 67 (1963).

Montgomery, Alabama, 94 S.Ct. 2416 (1974).[6] Furthermore, it is apparent that the above characterization of Respondent is fully supported by the finding of the Pennsylvania Public Utility Commission, as recently as March 25, 1974 when it granted the Respondent a rate increase of over $18 million.[7]

[6] In *Gilmore, supra*, this Court noted that:

"Traditional state monopolies, such as electricity, water, and police and fire protection–all generalized governmental services–do not by their mere provision constitute a showing of state involvement in invidious discriminations." *Supra*, 2426.

It should be noted that Petitioner's legal position is fully consistent with the above statement, since state action is present herein not because Respondent is a state granted monopoly, but because the Respondent's monopoly status enables it to effectuate state interests and facilitates termination of a customer's services.

[7] In its Order of March 25, 1974, at R.I.D. 64, *P.U.C. et al v. Metropolitan Edison Co.*,–P.U.R. 4th–, the Commission noted that:

"Respondent was incorporated under the laws of Pennsylvania on July 24, 1922, and is a subsidiary of General Public Utilities Corporation (G.P.U.), a holding company registered under the Public Utility Holding Company Act of 1935. G.P.U. now owns all the common stock of three operating electric subsidiaries; namely respondent, Pennsylvania Electric Company, and Jersey Central Power and Light Company, which form a fully integrated power pool. G.P.U. is a member of the Pennsylvania - New Jersey - Maryland (P.J.M.) inter-connection, which consists of twelve operating utility companies combined into six member systems. Respondent participates in P.J.M. as a subsidiary of G.P.U. . . ."

(continued)

Respondent's monopoly status is significant because it is by virtue of such state granted status that it is enabled to successfully threaten to terminate Petitioner's service with impunity. In addition, the fact that Respondent's monopoly status promotes certain state interests is significant in the consideration of the existence of state action. *See Railway Employees' Department v. Hanson*, 351 U.S. 225 (1956); *Lathrop v. Donahue*, 367 U.S. 830 (1961).

5. The fact that Respondent's activities are subject to some Federal regulation is not incompatible with a finding of action under color of state law with regard to termination of service for nonpayment of a bill.

Respondent seeks to exempt itself from a state action analysis merely because it is subject to some Federal regulation (Resp. Br., 16). However, the fact that Respondent is subject to some Federal regulation does not negate the fact that it is also extensively regulated by the Commonwealth of Pennsylvania. Whether Respondent may be considered as acting on behalf of the state in a particular situation depends upon how extensively the state is involved in that

"At August 31, 1972, respondent furnished electric service to 312,188 customers located in all or portions of four cities, 92 boroughs, and 155 townships located within 14 counties in eastern and central Pennsylvania. The service area comprises approximately 3,300 square miles or seven per cent of the entire state, with an estimated population of 826,400 at December 31, 1972." *Supra*, pp. 4-5.

particular conduct.[8] As noted above, the Commonwealth of Pennsylvania is significantly involved in the Respondent's challenged termination activity.

6. Respondent's actions constitute the effectuation of state policies which are repugnant to the Constitution.

On page 18 of its brief, Respondent suggests that a finding of state action should be confined only to cases involving racial discrimination. Such a suggestion certainly lacks merit especially in light of the history of the Civil Rights Act, 42 U.S.C. §1983, the purpose of which was to provide protection not only for former slaves, but for all people who were deprived of federal rights under color of state law. Cong. Globe, 42nd Cong., 1st Sess., App. 68 (1871). See also *Mitchum v. Foster*, 407 U.S. 224 (1972); *Lynch v. Household Finance Corp., supra*. Thus, this Court has decided numerous state action cases not involving racial discrimination. See *Public Utilities Commission v. Pollak, supra; United States v. Williams*, 341 U.S. 97 (1950); *Railway Employees Dept. v. Hanson, supra; Lathrop v. Donohue, supra; Marsh v. Alabama*, 326 U.S. 502 (1946).

[8] *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), noted by Respondent on page 17 of its brief, is fully consistant with this position, since in that case, Otter Tail was not exempt from anti-trust action where its particular complained of conduct was not subject to specific state governmental regulation or authorization.

Respondent correctly notes that there must be a nexus between the state and its relationship with the challenged activity for state action purposes. (Resp. Br., 19). However, Respondent incorrectly states that Pennsylvania law does not command or approve Respondent's summary termination action. (Resp. Br., 20). By authorizing Respondent's termination of service tariff, No. 41, Rule 15, through prior enactment of Sections 202(d) and 401 of the Public Utility Code, 66 Pa. Stat. Anno. §§1122, 1171, and, as further authorized by Public Utility Commission Tariff Regulation No. VIII and Electric Regulation Rule 14D, the Commonwealth of Pennsylvania has expressly sanctioned the Respondent's challenged activities. Furthermore, the fact that the Public Utility Commission actually held formal hearings in 1971 and 1972 regarding Respondent's proposed rate increase and various other proposed tariffs, including Rule 15, the very rule challenged herein, brings this case within the doctrine of *Public Utilities Commission v. Pollak, supra*, so as to justify a finding of state action based on the express and formal approval by the state of the challenged termination activity.

7. The fact that Respondent's revenues are subject to the Utilities Gross Receipts Tax is one index of state action.

Payment of taxes in itself need not justify a finding of state action. (Resp. Br., 26). However, the Utilities

Gross Receipts Tax, 72 P.S. §8101 et seq., is not an ordinary tax paid by all corporations, but instead, is a unique tax paid only by public utilities, based upon gross revenues. Thus, the state directly benefits from payment of said tax as reflected in increased company revenues resulting from threatened utility terminations.

Respondent is correct in its position that the Utilities Gross Receipts Tax is no different from the 5% profit sharing arrangement recognized as prominent for state action purposes in *Ihrke v. Northern States Power Co.*, 459 F.2d 566 (8th Cir., 1972), vacated for mootness, 409 U.S. 815 (1972). (Resp. Br., 26). However, it should be noted in this regard that the finding of state action in *Ihrke, supra,* was based not only on such profit sharing arrangement between the utility and the City of St. Paul, but upon a variety of state action indicia, including extensive regulatory review of the utility's tariffs and pervasive governmental regulation of the utility's activities. Such factors, as noted above, are abundantly present in the instant case.

8. In employing the authority of the Commonwealth to terminate Petitioner's electrical services, it is immaterial for state action purposes that the Respondent did not enter upon Petitioner's premises.

As noted above, contrary to Respondent's assertion (Resp. Br., 26), Respondent did terminate Petitioner's electrical service pursuant to state authorization. The fact that this termination was accomplished without

entry on Petitioner's premises is irrelevant, since the issue is whether the Respondent may terminate services without due process of law in the first instance. The means by which such service is terminated is not significant.[9]

9. Granting Petitioner due process of law will not deprive the Respondent of due process of law.

Respondent asserts that Petitioner seeks to use the federal courts to compel Respondent to furnish free service to its customers (Resp. Br., 28). This statement certainly misconstrues the nature of this action. At no time has Petitioner asserted that she should be provided with free service. Indeed, although Respondent has refused to bill Petitioner for services following the commencement of this action (Resp. Br., 9), Petitioner has placed funds aside for her estimated electric bills pending termination of this action. Accordingly, Petitioner seeks to assure only that utility services not be terminated without due process of law for failure to pay a disputed bill.[10] Petitioner does not seek to avoid

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[9] Respondent's tariffs authorizing entry on private property to terminate service were authorized by Commission Rule 14D and Commission Regulation No. VIII, and were subject to the approval of the Commission.

[10] The requirement of a prior hearing, as mandated by *Fuentes v. Shevin*, 407 U.S. 67 (1972), in the absence of "extraordinary circumstances", *Boddie v. Connecticut*, 401 U.S. 371 (1971), is not modified by *Arnett v. Kennedy*, 40 L.Ed.2d 15 (1974), or by *Mitchell v. W.T. Grant Co.*, 40 L.Ed.2d 406 (1974).

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payment of the current bill pending resolution of a disputed bill.

Arnett v. Kennedy, supra, involved the termination of a public employment situation where rights could be adequately vindicated by a post hearing review and where adequate administrative remedies were available. It should be noted in that case that six members of this Court adhered to the concept that "the adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms". *Arnett v. Kennedy, supra* (Opinion of Mr. Justice Powell, concurring in part and concurring in the result in part). Furthermore, such property interests are not "created by the Constitution"; rather, they are created and their dimensions are defined by existing rules that "stem from state laws." *Board of Regents v. Roth,* 408 U.S. 564 (1972) at 577. Such property interests are created and defined by the Pa. Public Utility Law, 66 Pa. Stat. Anno. §1171, in the instant case. In balancing the individual's property interests in due process of law against the competing interests of the state, factors such as the individual's "brutal need" and "being driven to the wall" must be afforded important consideration. *Arnett v. Kennedy,* (opinion of Mr. Justice White, concurring in part and dissenting in part) 40 L.Ed.2d at 54-55. Certainly, such factors are present in the instant case.

The case of *Mitchell v. W.T. Grant, supra,* involved a creditor replevin situation specifically distinguishable from *Fuentes supra,* in that, due to fear of disposal or waste by the debtor of the creditor's property, the creditor would be permitted to temporarily seize such property pursuant to a closely supervised procedure under control of the court from beginning to end, in which a sworn affidavit and petition is presented to and approved by a judge, following posting of a bond. This procedure also allows for return of the property to the debtor and an immediate hearing upon posting of a counterbond by the debtor, upon whom the "impact" of a temporary deprivation is not

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Respondent asserts that the tremendous hardship that would allegedly be imposed upon it by requiring it to afford customers the opportunity to resolve disputed bills before their services are terminated justifies a continued denial of the constitutional rights of such customers. Certainly, any added costs of administration must be subordinate to consideration of whether due process is to be provided in the first instance. See *Bell v. Burson,* 402 U.S. 535 (1971). Only after a determination is made that due process is required may consideration be given to what type of process is in fact due, following a "balancing" of the circumstances. *Board of Regents v. Roth,* 408 U.S. 564 (1972).

In this case, although due process requires that customers be afforded a prior opportunity to resolve disputes, the actual nature of the dispute resolution procedure may vary depending upon the circumstances of the case, and may be informal in the first instance. Contrary to Respondent's expressed fears, Petitioner does not seek to impose an "inflexible" hearing requirement in every case. (Resp. Br., 28). Hence, the requirement of providing a conference with a company official or an informal hearing at the company level would seem to be an inexpensive method of resolving disputes. *See Amicus Brief* of the Public Service

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great. Such situation has little applicability to the instant case, where the temporary deprivation of utility services following a summary and unsupervised termination may affect life itself. *Palmer v. Columbia Gas of Ohio,* 342 F. Supp. 241 (N.D. Ohio, W.D., 1972), affirmed 479 F.2d 153 (C.A. 6, 1973).

Commission of New York.[11] Certainly, the requirement of a formal hearing conducted by the Public Utility Commission following the failure of the utility company to satisfactorily resolve the dispute, would not involve such extensive costs as to make such procedure economically infeasible or constitutionally prohibitive.[12] Finally, the cost involved in disposing of administrative appeals cannot outweigh due process requirements. *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Shapiro v. Thompson*, 394 U.S. 618 (1969). Thus, when presented with the very argument that the utility would suffer an undue financial burden if required to comport with due process of law, the Fifth Circuit Court of Appeals stated:

> "Finally, in view of the concededly small number of similar applicants, the miniscule percentage of the Department's revenue that is affected, the minimal cost of instituting constitutionally sufficient procedures, and the availability of other collection methods, we hold the City has failed to demonstrate any substantial detriment to its revenue bond rating." *Davis v. Weir, supra*, 497 F.2d at 145.

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[11] See also "Re Rules and Regulations Governing the Disconnection of Utility Services", of the Vermont Public Service Board, 2 P.U.R. 4th 209 (April 19, 1974) at 218.

[12] It should be expressly noted that at the time of this action, as well as at present, neither the Respondent's tariffs nor the Public Utility Commission's regulations provided for any formal method of dispute resolution prior to the termination of a customer's utility services.

CONCLUSION

For the foregoing reasons, Petitioner respectfully urges that this Court reverse the Judgment and Opinion of the Court below.

Respectfully submitted,

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